

HIT THE WOAH¹ THAT’S MY DANCE: THE CASE FOR CHOREOGRAPHIC COMPULSORY LICENSING

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INTRODUCTION

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¹ *How to Renegade*, www.wikihow.com/Renegade (last updated Apr. 28, 2022) [<https://perma.cc/4x4t-KSUH>]; wikiHow, *How to Renegade (Dance Tutorial)*, YOUTUBE (Mar. 25, 2020), <https://www.youtube.com/watch?v=b1U7LS4XCCY> [<https://perma.cc/TM4S-K25W>].

Picture this: you are about fourteen years old; you have never known a world without the Internet, and social media is the first thing that comes to your mind when you contemplate putting creative works out into the world. You take dance classes after school and love collaborating with your friends to make choreographic works—though you call them “TikTok dances.”²

Many creative adolescents across the country fit within this archetype.³ I, as an elder member of Generation Z,⁴ almost did when I was younger. I spent most of my adolescence and undergraduate years in dance studios. I spent late nights and weekends creating choreography with my friends and posting much of it on YouTube. I knew very little about copyright law during my years studying dance, but I knew enough to know that dance was treated differently than other creative works. When I entered law school, I vowed to the dance communities I was a part of to make sense of why no choreography appears to be protected on TikTok and beyond, and how choreography seems to migrate across platforms and into others’ works without anyone ever batting an eye. This Note is my attempt to deliver some answers and solutions to the dance communities that impacted my young adult life and continue to inspire me.

TikTok was ascending in popularity during my senior year of college in 2019 and became a big part of many of our lives during the early days of the COVID-19 pandemic.⁵ In late 2019, a TikTok dance called the “Renegade” became emblematic of TikTok’s ability to create ubiquitous pop culture phenomena.⁶ In October of that year, then fifteen-year-old Charli

² TikTok is an immensely popular social media app where users can share short-form mobile videos. See *Our Mission*, TIKTOK, <https://www.tiktok.com/about?lang=en>; see also 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> [<https://perma.cc/C2W9-RY29>] (“Video creators have all sorts of tools at their disposal: filters as on Snapchat . . . ; the ability to search for sounds to score your video. Users are also strongly encouraged to engage with other users, through “response” videos or by means of “duets” — users can duplicate videos and add themselves alongside.”).

³ See Bradian Muliadi, *What the Rise of TikTok Says About Generation Z*, FORBES (July 7, 2020), <https://www.forbes.com/sites/forbestechcouncil/2020/07/07/what-the-rise-of-tiktok-says-about-generation-z/?sh=69e136096549> (“Over 60% of TikTok users are comprised of Generation Z, which refers to users born after 1996. Generation Z is one of the most diverse generations yet, with high levels of education, digital nativism, social and cultural awareness and a high propensity to be more expressive.”) [<https://perma.cc/ZL3N-BUEN>].

⁴ *Social Media by Generation*, GWI, <https://www.gwi.com/reports/social-media-across-generations> (Gen Z consists of individuals born between 1997 and 2005, while Millennials were born between 1983 and 1996.) [<https://perma.cc/VB4K-4P6Z>].

⁵ See Kim Lyons, *TikTok Says it has Passed 1 Billion Users*, THE VERGE, (Sept. 27, 2021), <https://www.theverge.com/2021/9/27/22696281/tiktok-1-billion-users> [<https://perma.cc/YTC7-AT4U>].

⁶ See Trevor Boffone, *RENEGADE: DIGITAL DANCE CULTURES FROM DUBSMASH TO TIKTOK*, 1-3 (Oxford Scholarship Online 2021), <https://oxford-universitypressscholarship->

D'Amelio posted a video of herself doing the fifteen-second dance to the K-Camp song "Lottery," and her audience of ninety million followers became enthralled by the "challenge."⁷ In five months, thirty-four million videos using the "Renegade" audio from "Lottery" were posted to TikTok.⁸ Dancers ranged from Alex Rodriguez to Lizzo to gaggles of high school kids, and everyone in between.⁹ The Renegade's popularity typifies the "D'Amelio Effect," where seemingly everything reigning TikTok queen Charli D'Amelio¹⁰ posts cannot help but go viral on the platform.¹¹ Charli D'Amelio popularized the Renegade but did so without crediting the dance's actual creator: then fourteen-year-old dancer Jalaiah Harmon.¹²

Harmon came home from school on September 25, 2019, and asked a friend to choreograph and post a dance with her.¹³ Harmon and her friend posted the dance they created to "Lottery" on the social media platform Funimate and then on Instagram.¹⁴ That October, TikTok user @global.jones moved the dance over to TikTok, modified some movements to make them easier to emulate, and the #RenegadeChallenge was born.¹⁵

Harmon wanted credit for the viral dance she had created.¹⁶ She took to the comments of videos of others doing her Renegade dance, trying to explain that she was the girl behind the moves and asking users to tag her—to indicate she was the original creator of the content—largely to no avail.¹⁷ Harmon was eventually unveiled to the world as the Renegade's creator through a New York Times profile and was featured on The Ellen DeGeneres Show,¹⁸ but was this enough?

com.proxygt-law.wrlc.org/view/10.1093/oso/9780197577677.001.0001/oso-9780197577677-chapter-1

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Charli D'Amelio, PEOPLE.COM, <https://people.com/tag/charli-damelio/> [<https://perma.cc/9RR8-WR3H>] ("Charli D'Amelio is an American social media personality. She rose to fame in 2019 after her dance videos went viral on TikTok. D'Amelio is best known for being the first content creator to reach both 50 million and 100 million followers on TikTok. She currently has the most-followed account on TikTok.").

¹¹ *Id.*

¹² Taylor Lorenz, *The Original Renegade*, N.Y. TIMES (Feb 13, 2020), <https://www.nytimes.com/2020/02/13/style/the-original-renegade.html> [<https://perma.cc/T4WW-X89Q>].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Boffone, *supra* note 6, at 4.

Copyright law aims to stimulate the production of creative works by allowing creators to reap monetary benefits from their creative labor.¹⁹ In the United States, reward to the author is a secondary consideration.²⁰ The primary consideration is creating market incentives for the creation of artistic goods that can be enjoyed by consumers and monetized.²¹ The Copyright Act of 1976 protects “choreographic works,” but neither the Act itself nor its legislative history defines what a choreographic work is, nor do they provide insight into how they should be protected.²²

Protecting choreographic works under copyright law is complicated because choreography is a social and interactive process—sampling, paying homage, and borrowing from others’ creative works is intrinsic to the act of dance composition.²³ Even in light of the collaborative, evolutionary nature of choreography, the way Jalaiah Harmon was treated by other social media dancers and the media at large feels wrong at the very least. Yes, steps can and should be borrowed or modified, but that does not mean chunks of choreography should be lifted from one person to another, or moved from one medium to another, without attribution and compensation of some sort. Outside of the scope of choreography, this unjust treatment would be considered copyright infringement. Should we throw up our hands and say that infringement is just a part of dance that we must accept?

The prolific rise of TikTok has meant that choreography is peaking in its economic value.²⁴ It is also a double-edged sword: It is easier than ever to record and transmit dance compositions but it is also easier than ever to unknowingly infringe a copyright in a choreographic work a creator might not even know they own.²⁵ In fact, the TikTok platform almost encourages this type of infringement by ignorance.²⁶ TikTok wants Charli D’Amelio to

¹⁹ Thomas J. Overton, *Unraveling the Choreographer's Copyright Dilemma*, 49 TENN. L. REV. 594, 596 (1982).

²⁰ *Id.*

²¹ *Id.* at 596-97

²² 17 U.S.C. § 102(4); *see* Overton, *supra* note 17, at 598.

²³ *See* Kriss Ravetto-Biagioli, *Whose Dance Is It Anyway?: Property, Copyright and the Commons*, 38 THEORY, CULTURE & SOCIETY 101, 103, 119, 122 (2021).

²⁴ *See* Bradian Muliadi, *What the Rise of TikTok Says About Generation Z*, FORBES (July 7, 2020), <https://www.forbes.com/sites/forbestechcouncil/2020/07/07/what-the-rise-of-tiktok-says-about-generation-z/?sh=69e136096549> [<https://perma.cc/ZL3N-BUEN>]; Jeffrey M. O’Brien, *Welcome to the TikTok Economy*, FORTUNE (Oct. 7, 2021), <https://fortune.com/longform/tiktok-economy-monetization-business-social-media-platforms-creators/> [<https://perma.cc/XT5R-7WWK>].

²⁵ *See* Jill Vasbinder, *There’s a long history or dances being pilfered for profit — and TikTok is the latest battleground*, THE CONVERSATION (July 23, 2021), <https://theconversation.com/theres-a-long-history-of-dances-being-pilfered-for-profit-and-tiktok-is-the-latest-battleground-164215> [<https://perma.cc/F7JB-963C>].

²⁶ *See* Boffone *supra* note 6, at 57-58.

popularize someone else's choreography and turn it into a dance challenge.²⁷ This is when ad revenue really starts flowing in.²⁸

The extent to which dancers like Jalaiah Harmon and Charli D'Amelio should share in the revenue TikTok brings in from advertising and other sources is a question I seek to answer. The answer, I argue, is rooted in drawing parallels between how it became easier to fix musical compositions in tangible media of expression and transmit them for public consumption during the twentieth century and today's newer-found ease in fixing choreographic works, or what I refer to as "dance compositions," and transmitting them via TikTok and other online platforms.²⁹ Part I will discuss what types of dance sequences are entitled to copyright protection in the first place, with particular focus on issues of originality, and provide an overview of music licensing frameworks that could be useful models upon which to base a scheme of choreographic licensing. Part II will discuss how choreographers' lack of an effective collective bargaining regime and political clout should spur legislative involvement to protect those who cannot assert their own rights and prevent those with large TikTok followings from making huge sums of money based on views while choreographers go uncompensated. Part III proposes a solution to the issue of the under-protection of dance compositions within copyright law that resembles the mechanical licensing scheme for the reproduction and distribution of musical compositions set forth in Section 115 of the Copyright Act of 1976 and administered primarily by the Harry Fox Agency. Part III discusses three possible mechanisms for collecting and distributing royalties within such a licensing scheme. Finally, Part IV will address possible arguments against increased copyright protection for choreographic works and alternative ways to combat the issue of choreographer under-compensation, about which copyright jurisprudence appears to be apathetic.

Ultimately, I argue that the economic conception of copyright has thus far failed to protect choreography to the extent it protects musical compositions. Additionally, the rise of the TikTok dance is a way to reconcile creative processes in dance that have thus far been conceived of as being incompatible with economic incentives of creation with American capitalist copyright norms. TikTok presents an opportunity to bring dance into the economic copyright regime that legislators should seize to promote creation and protect creators.

²⁷ See *id.* "Young people with significant follower counts are lucrative marketing spaces—effectively, hyper-specific social media billboards—that large companies have become increasingly interested in."

²⁸ *Id.*

²⁹ JULIA L. ROSS & MICHAEL J. HUPPE, *MUSIC LAW: CHANGING LANDSCAPES IN THE MUSIC INDUSTRY AND THE LAW THAT GOVERNS IT*, 46 (West Academic 2021).

I. COPYRIGHT FUNDAMENTALS: COPYRIGHTABLE CHOREOGRAPHY AND THE MUSIC COMPOSITION FRAMEWORK

Copyright law in the United States is primarily justified by utilitarian motives to protect creative works, providing economic benefits to creators so that they continue to create.³⁰ This attempts to solve a public goods problem:³¹ Creative works by nature are nonexcludable; thus, it is impossible to prevent someone from enjoying a song or recreating choreography to their heart's content.³² Copyright law grants creators entitlements to exclude others from enjoying certain benefits of the work to compensate creators for their creative labor.³³ The promise of this compensation is, under an economic model of copyright law, what encourages creators to continue creating.³⁴ Utilitarian models of copyright solve public goods issues, but they can also backfire when the scope of protection is too large.³⁵ When too much material is locked up in legally created monopolies like copyright, progress can be stifled.³⁶ This is of particular concern in a dance context, where building upon preexisting components of dance compositions is essential to the progress of the medium.³⁷ As such, a robust library of public domain materials is necessary

³⁰ Julie E. Cohen et al., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY*, 7 (Wolters Kluwer, 5th ed. 2020).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 8.

³⁶ *Id.*

³⁷ *See id.* Utilitarian justifications for copyright protection may not entirely support the argument that greater protection is needed for dance compositions, but the European moral rights framework provides additional support for the compulsory license proposed in Part III. For example, French tradition acknowledges an intimate and sacred relationship between authors and their works. *See* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 *TUL. L. REV.*, 991, 992 (1990). The creation is an extension of the author themselves and must be protected as such. *See id.* This moral rights framework also justifies a right to prevent distortion, destruction, or misattribution of one's creative work that exists in the United States for works of visual art only but is more expansive in Europe. Cohen et al. *supra* note 28, at 12; *see* 17 U.S.C. §106A. A natural rights view of copyright is rooted in the Lockean idea that one is entitled to the fruits of their labor and their property is the mix of what one takes and mixes with their labor. John Locke, *TWO TREATISES ON GOVERNMENT*, Book II, ch. V (1690); Cohen et al., *supra* note 28, at 12-13. In a choreographic context, this should mean that the combination of steps Jalaiah Harmon took from the public domain, arranged strategically to highlight certain aspects of the song "Lottery," and combined with her own unique movement style should give rise to a certain bundle of rights.

for the development of dance as an art form.³⁸ These standardized elements can be arranged in original ways and combined with one's unique movement style to create works like Jalaiah Harmon's *Renegade*.³⁹

Harmon was fighting for attribution across TikTok, but what she was actually entitled to under the Copyright Act of 1976 was an exclusive right to control the reproduction, distribution, and public performance of her *Renegade* choreography.⁴⁰

A. Copyrightable Choreography

Choreographic works have been copyrightable since 1978, the effective date of the Copyright Act of 1976.⁴¹ Prior to this, some choreographic works were eligible for copyright protection under the category of dramatic or dramatico-musical works, but the 1976 Act marked that first-time choreography was protected in isolation from music and drama.⁴² The Copyright Office defines "choreographic works" as:

[T]he composition and arrangement of dance movements and patterns, . . . usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.⁴³

This definition is further clarified by what types of movement are excluded from copyright protection:

Social dance steps and simple routines are not copyrightable . . . Thus, for example, the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. However, this is not a restriction against the incorporation of social dance steps and simple routines, as such, in an otherwise registrable choreographic work. Social dance steps, folk dance steps, and individual ballets steps alike

³⁸ See JULIE VAN CAMP, COPYRIGHT OF CHOREOGRAPHIC WORKS 72–73 (Stephen F. Breimer et al. eds., 1994) (discussing how dance consists of various types of public domain or standardized steps that are combined into original choreographic works).

³⁹ See *id.*

⁴⁰ See 17 U.S.C. § 106.

⁴¹ VAN CAMP, *supra* note 38 at 59.

⁴² See *id.*

⁴³ U.S. Copyright Off., Compendium of Copyright Office Practices, Compendium II (1984) [<https://perma.cc/3ZC5-J6K5>].

may be utilized as the choreographer's basic material in much the same way that words are the writer's basic materials.⁴⁴

Copyright protection inheres in "original works of authorship fixed in any tangible medium of expression."⁴⁵ While it is relatively simple to determine when a choreographic work has been fixed, originality in choreographic works is harder to define. As the exclusions from copyright protection above illustrate, defining what a choreographic work is *not* is much simpler than identifying what makes a series of movements sufficiently original to be entitled to copyright protection.

Originality requires a minimal degree of creativity.⁴⁶ For a series of dance movements, copyright protection can subsist in the "composition and arrangement of a related series of dance movements and patterns organized into an integrated, coherent, and expressive whole" but not in "the mere selection and arrangement of physical movements."⁴⁷ This is consistent with the Supreme Court's decision in *Feist*, which held that originality requires independent creation and some minimal degree of creativity that is more than "sweat of the brow" or "garden-variety" output.⁴⁸ *Feist* concerned a list of addresses and phone numbers in a phone book—a compilation of pre-existing facts.⁴⁹ Per the Court in *Feist*, facts cannot merely be arranged in a compilation to render the compilation original—the selection, coordination and arrangement of those facts must be unique to give rise to an original work of authorship.⁵⁰

A series of dance steps can be likened to a compilation of facts, especially TikTok dances that consist of repeatable hip-hop or hip-hop-inspired movements. Originality, especially when looking at compilations of pre-existing material, does not demand novelty.⁵¹ Thus, drawing from steps learned during one's dance training in a certain style does not preclude copyright protection in a choreographic work.⁵² In this way, dance composition is very similar to musical composition, where a composer would

⁴⁴ *Id.*

⁴⁵ 17 U.S.C. § 102(a).

⁴⁶ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

⁴⁷ 77 Fed. Reg. No. 121 37605, 37607 (Jun. 22, 2012) (describing this entry in the Federal Register as a "Statement of Policy; Registration of Compilations") [<https://perma.cc/L6VE-39V8>].

⁴⁸ *Feist*, 499 U.S. at 353 at 360-62.

⁴⁹ *Id.* at 342-44.

⁵⁰ *Id.* at 358.

⁵¹ *Feist*, 499 U.S. at 345, 358; *Van Camp*, *supra* note 38 at 62-63.

⁵² *Van Camp*, *supra* note 38 at 62-63 ("Simply because a choreographer has been influenced by predecessors (as common in dance as in other art forms) does not preclude sufficient originality for copyright protection.").

select and arrange notes and chords into a new melody.⁵³ In a music context, it is clear that something like a bossa nova bassline, which is emblematic of a particular genre, would be considered *scene à faire* (or *musique à faire*) and would not in itself be copyrightable but may be part of a larger work that is copyrightable as a whole.⁵⁴ In a dance context, for example, a series of pirouettes in ballet, common in many solo variations, would not be copyrightable in isolation, but the larger work the pirouettes are a part of would be copyrightable as an original compilation of public domain materials within the genre of ballet dance.⁵⁵

Copyright in many choreographic works is likely thin because most works are selections and arrangements of preexisting materials—movements or gestures that already exist as facts in the world.⁵⁶ When copyright is thin, copyright owners can only assert infringement claims when others copy their work exactly or near exactly.⁵⁷ Thin copyright does not vitiate entitlements to protection in TikTok dances, though. In fact, those who participate in “dance challenges” like the Renegade seek to emulate the original steps as much as possible. They only add on certain stylistic choices like facial expressions or dynamics, which include accenting certain moves, playing with intentionality, and hard and soft movement qualities within the prescribed steps.⁵⁸ Even in a thin copyright world, TikTok is ripe with exact-copying-infringement of choreography.

On TikTok and beyond, series of steps, mostly preexisting because of the nature of training and creation in dance, assembled and arranged in a unique way, give rise to a copyrightable, and thus original, choreographic work.⁵⁹ Though copyright owners in choreographic works have the theoretical ability to enforce their right to control their works’ reproduction, distribution, and public performance against infringers, these rights can only be enforced through litigation that is both expensive and unlikely to succeed. Since the addition of choreographic works to the 1976 Copyright Act, there have been

⁵³ See *id.* at 63.

⁵⁴ Cohen et al., *supra* note 30, at 129.

⁵⁵ Van Camp, *supra* note 38 at 63-64.

⁵⁶ See *Feist*, 499 U.S. at 349 (“This inevitably means that the copyright in a factual compilation is thin.”).

⁵⁷ See *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

⁵⁸ For the purposes of this paper, whether or not a series of movements is original will be based on the steps themselves, disregarding how a performer’s intention and related stylistic choices may affect how the work affects audiences. Thomas J. Overton, *Unraveling the Choreographer’s Copyright Dilemma*, 49 TENN. L. REV. 594 (1982). Originality presents an interesting dilemma for dance, where many choreographers have unique styles of doing movements that are anatomically the same but imbued with different intention. *Id.*

⁵⁹ See *Feist*, 499 U.S. at 358.

very few court cases involving copyright infringement in choreography.⁶⁰ The most notable of these is *Horgan v. Macmillan Inc.*, where the executrix of ballet choreographer George Balanchine's estate sued a publishing company depicting various photographs of performances of *The Nutcracker*, claiming the photos depicted a sufficient amount of the ballet to be an infringing reproduction of copyrighted choreography.⁶¹ The Second Circuit ruled against the Balanchine estate, holding that the standard for infringement of a choreographic work "is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is 'substantially similar' to the former."⁶² More recently, federal courts have dealt with dance-related copyright in relation to the video game Fortnite.⁶³ Rapper 2 Milly attempted to sue the makers of Fortnite for using his "Milly Rock" dance in the game but later dropped his suit after the Supreme Court ruled that claimants cannot sue for infringement until after a copyright registration is issued by the Copyright Office.⁶⁴ Few choreographic works are registered with the Copyright Office both because what constitutes an original choreographic work is so vaguely defined by the Copyright Act and Copyright Office, and because choreographers lack requisite resources and legal knowledge needed to register their works.⁶⁵ The onerous, high-risk, and expensive nature of enforcing a choreographic copyright under the current regime, involving attempting to register a copyright and then affirmatively suing a single infringer in federal court, combined with the massive scale of exact-copying infringement that occurs on TikTok, necessitates the creation of an efficient scheme of registration and enforcement for choreography in the form of compulsory licenses.

B. Musical Compositions

The way musical compositions are protected under the current copyright regime can serve as a blueprint for a choreographic compulsory

⁶⁰ SEE LAURA KEES, *COPYRIGHT FOR CHOREOGRAPHY: WHEN IS COPYING A DANCE A COPYRIGHT VIOLATION?*, IP WATCHDOG, (NOV. 19, 2020, 7:15 AM), [HTTPS://WWW.IPWATCHDOG.COM/2020/11/19/COPYRIGHT-CHOREOGRAPHY-COPYING-DANCE-COPYRIGHT-VIOLATION/ID=127455/](https://www.ipwatchdog.com/2020/11/19/copyright-choreography-copying-dance-copyright-violation/id=127455/) [HTTPS://PERMA.CC/Y8EH-5B9A]; ANNE WEINHARDT, *COPYRIGHT INFRINGEMENT OF CHOREOGRAPHY: THE LEGAL ASPECT OF FIXATION*, 13 J. CORP. L. 839, 844–45 (1987).

⁶¹ Weinhardt, *supra* note 60 at 844 (citing *Horgan v. Macmillan Inc.*, 789 F.2d 157, 159 (2d Cir. 1986)).

⁶² *Horgan*, 789 F.2d at 162.

⁶³ Kees, *supra* note 60.

⁶⁴ *Id.*; *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881 (2019).

⁶⁵ Weinhardt, *supra* note 60 at 845.

licensing regime. Choreographic compositions and musical compositions are similar because both contain unique arrangements of preexisting materials and modern recording technology facilitates easier fixation of works. The newfound ease of fixing choreography in tangible media of expression through video recordings is reminiscent of how new fixation technologies for music, beyond just sheet music, led to greater copyright protection for musical works in the early twentieth century.⁶⁶

Player pianos were becoming increasingly popular at the dawn of the twentieth century. These instruments could perform compositions of one's choosing upon insertion of a "piano roll"— a perforated, mechanical reproduction of a musical work.⁶⁷ The Supreme Court in 1908, in *White-Smith Publishing Co. v. Apollo Co.*, addressed whether these piano rolls were infringing reproductions of the musical compositions they mechanically instructed player pianos to perform.⁶⁸ The Court ultimately concluded that the rolls were not "copies" because they were not visibly intelligible reproductions of musical notation.⁶⁹ This ruling led Congress to express concern over how patents in piano roll technology alone did not protect the underlying musical works the rolls instructed pianos to play.⁷⁰ As a result, Congress enacted Section 1(e) of the Copyright Act of 1909, which granted authors of musical works exclusive protection over their compositions until they permitted mechanical reproductions to be made of their work, at which time the work could be used by anyone so long as a royalty is paid.⁷¹ This was the first mechanical or compulsory license for musical works.⁷²

In enacting Section 1(e), Congress also responded to a concern about certain groups having a monopoly over the right to reproduce musical works mechanically.⁷³ Prior to *White-Smith*, leading piano roll manufacturer Aeolian Company had entered into contracts with nearly all of the nation's music publishers granting Aeolian the exclusive right to make piano rolls of the publishers' compositions.⁷⁴ Monopolies like Aeolian's were exactly what Congress was trying to undo via the 1909 mechanical license.⁷⁵ Compulsory licensing schemes like Section 1(e) strike a balance where copyright owners profit off of the proliferation of their works without restraining who can reproduce their compositions.

⁶⁶ ROSS & HUPPE, *supra* note 29, at 46 (West Academic 2021).

⁶⁷ *Id.*

⁶⁸ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908).

⁶⁹ *Id.* at 51; *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908).

⁷⁰ *Id.* at 41.

⁷¹ *Id.* at 54; Copyright Act of 1909 § 1(e).

⁷² See ROSS & HUPPE, *supra* note 29, at 57-59.

⁷³ *Id.* at 53, 58.

⁷⁴ *Id.* at 53.

⁷⁵ *Id.* at 53, 58.

Applying such a scheme to choreography on TikTok will prevent dances like the Renegade from being locked up in content monopolies—where those like Harmon must either affirmatively authorize every reproduction of her work, or sell exclusive rights to her dance to the highest bidder (like an Aeolian equivalent in the dance world)—while still compensating creators proportionately as their content “blows up.”⁷⁶

Looking to the 1976 Copyright Act, Section 115 contains a mechanical license for the use of musical compositions in recordings and other mechanical methods of fixing compositions. Section 115 resembles the 1909 Act compulsory license: Once the copyright owner has authorized one fixation of their musical work and that version has been distributed to the public, another person may obtain a license to distribute phonorecords (material objects in which sounds not accompanying a motion picture are fixed and later perceived)⁷⁷ of that work to the public for private use.⁷⁸ To make that subsequent work based on someone else’s composition, one must serve notice either on the copyright owner themselves or file notice of their intention to do so with the Copyright Office⁷⁹ and pay royalties to the copyright holder in an amount either set by the Copyright Royalty Judges or negotiated by the parties.⁸⁰ Usually, this mechanical right is administered by the Harry Fox Agency,⁸¹ which acts as the agent of music publishers and collects and distributes royalties.⁸²

In 2018, the President signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, which modifies the mechanical license under Section 115 for digital delivery of phonorecords of musical works.⁸³

⁷⁶ This slang phrase is used to describe the phenomenon through which videos proliferate at exponential rates by way of the TikTok algorithm. Your video “blows up” when it goes viral on TikTok. See “*blow up*,” URBANDICTIONARY, <https://www.urbandictionary.com/define.php?term=blow%20up> [<https://perma.cc/VA7Z-KQXS>]; “*My video blew up. What do I do from here?*”, REDDIT, https://www.reddit.com/r/Tiktokhelp/comments/lfilwr/my_video_blew_up_what_do_i_do_from_here/ [<https://perma.cc/P3SB-C7S3>].

⁷⁷ 17 U.S.C. § 101.

⁷⁸ 17 U.S.C. § 115(a)(1)(A).

⁷⁹ 17 U.S.C. § 115(b)(1).

⁸⁰ 17 U.S.C. § 115(c)(1).

⁸¹ See ROSS & HUPPE, *supra* note 29, at 13.

⁸² *Id.*; FAQs, THE HARRY FOX AGENCY LLC, <https://www.harryfox.com/#/faq>, (last visited Apr. 4, 2022) [<https://perma.cc/2LX7-YNMR>].

⁸³ *E.g.*, THE PUBLIC MUSICAL WORKS DATABASE AND TRANSPARENCY OF THE MECHANICAL LICENSING COLLECTIVE, 85 FED. REG. 58170 (SEPT. 17, 2020), [HTTPS://WWW.FEDERALREGISTER.GOV/DOCUMENTS/2020/09/17/2020-20078/THE-PUBLIC-MUSICAL-WORKS-DATABASE-AND-TRANSPARENCY-OF-THE-MECHANICAL-LICENSING-COLLECTIVE](https://www.federalregister.gov/documents/2020/09/17/2020-20078/the-public-musical-works-database-and-transparency-of-the-mechanical-licensing-collective) [[HTTPS://PERMA.CC/U4HV-K6AT](https://perma.cc/U4HV-K6AT)]; 17 U.S.C. § 115(d)(3).

The Music Modernization Act (MMA) establishes a new blanket licensing regime, as opposed to a song-by-song licensing system, that became available on January 1, 2021 and is administered by a mechanical licensing collective (MLC) designated by the Copyright Office.⁸⁴ The MLC collects and distributes royalties for covered activities, makes efforts to identify musical works embodied in particular sound recordings as well as locate the copyright owners of such works, and administers a process allowing copyright owners to claim ownership of musical works.⁸⁵ It also maintains a database of musical works and other information relevant to licensing activities under Section 115.⁸⁶ Though the administration of the MMA and the establishment of the MLC is still in progress, the use of a central agency designated by the Copyright Office to administer the digital delivery of musical compositions and track unauthorized uses of works shows how copyright law is becoming more attentive to the unique movement of creative works within digital spaces. As such, the MLC's organization could serve as a model for a centralized, choreographic compulsory license administration agency.

As the law currently stands, so long as choreographic works surmount the *Feist* originality floor and arrange known steps in a unique way, a utilitarian frame of copyright law that wants to incentivize creative production justifies creating a more robust scheme to protect the existing rights of choreographic copyright owners. Because musical works are also compositions that consist of preexisting material artists learn during their training in a particular art-making tradition, it is logical that musical and choreographic works be treated in analogous ways.

II. UNDERENFORCEMENT OF CHOREOGRAPHIC COPYRIGHTS NECESSITATES LEGISLATIVE ACTION

In the early days of TikTok, the platform was accused by many in the music industry, particularly the National Music Publishers' Association (NMPA), of myriad violations of U.S. copyright law pertaining to the rights of songwriters and music publishers.⁸⁷ In April 2020, NMPA's chief executive

⁸⁴ *SEE* 17 U.S.C. § 115(D)(3).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Murray Stassen, *TikTok Inks Global Deal with Music Publishers (Who Previously Threatened to Sue It)*, MUSIC BUS. WORLDWIDE (Jul. 23, 2020), <https://www.musicbusinessworldwide.com/tiktok-inks-global-multi-year-deal-with-music-publishers/> [<https://perma.cc/L4P3-P8SQ>]; *see also* Lydia Bayley, *TikTok: A Copyright Time Bomb?*, IP Bytes (Mar. 29, 2021), <http://blogs.luc.edu/ipbytes/2021/03/29/tiktok-a-copyright-time-bomb/> ("Record labels and music publishing companies initially erupted with concerns over copyright infringement. However, the fiery response has been quelled

told the Financial Times that a lawsuit against the platform was “likely a future step” and estimated that more than fifty percent of the music publishing market was unlicensed within TikTok.⁸⁸ Also in early 2020, Universal Music Publishing was negotiating a licensing agreement with TikTok as, during that time, it did not have such an agreement in place with the platform.⁸⁹ This meant that Universal’s songwriters were not earning royalties from the reproduction of their musical works in TikTok videos.⁹⁰

The NMPA is an organization that represents the interests of thousands of music publishing companies.⁹¹ These companies also advocate on behalf of the songwriters they employ.⁹² Because of the NMPA’s influence in the music industry and their ability to publicly call TikTok out for their infringement, going so far as to threaten litigation, TikTok and the NMPA were able to negotiate a multi-year licensing agreement in July 2020 so that the songwriters and publishers represented by the NMPA could begin to receive royalties for their works’ usage on TikTok.⁹³ Universal Music Group also reached an agreement with TikTok, announcing an “expanded global alliance” with the platform in early 2021.⁹⁴

Even in the musical works space, where there is a clearly defined copyright regime, works were exploited without just compensation early in TikTok’s existence. Choreographic works not only lack a concrete system of copyright protection, but they also fail to have a collective bargaining regime advocating on their creators’ behalf.⁹⁵ Many choreographers are not in unions, and they are often not represented the way that songwriters are represented by music publishers.⁹⁶ When a copyrightable choreographic work is imitated

through ongoing negotiations and procurement of licensing agreements.”)
[<https://perma.cc/W43Y-V966>].

⁸⁸ Anna Nicolaou, *Music Companies Threaten to Sue TikTok Over Copyright*, FIN. TIMES (Apr. 4, 2020), <https://www.ft.com/content/1b3b78ea-32a3-4237-8b79-3595820eeb63> [https://perma.cc/NMH9-TX9C].

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See* Stassen, *supra* note 86; *see also* Anne Gleason, *Copyright Owners’ Love/Hate Relationship With TikTok and Instagram Raises Legal Issues*, NAT’L L. REV. (Aug. 28, 2020), <https://www.natlawreview.com/article/copyright-owners-lovehate-relationship-tiktok-and-instagram-raises-legal-issues> [https://perma.cc/886H-G2RJ].

⁹⁴ *TikTok and Universal Music Group Announce Expanded Global Alliance*, UNIVERSAL MUSIC GRP. (Feb. 8, 2021), <https://www.universalmusic.com/tiktok-and-universal-music-group-announce-expanded-global-alliance/> [https://perma.cc/V8QF-XKQH].

⁹⁵ This is because their copyrightability remains vaguely defined and they are rarely registered with the copyright office to facilitate litigation. *See* Part I *supra*.

⁹⁶ *See* Margaret Fuller, *A Labor Movement for the Artists Who Make Popular Culture Move*, N. Y. TIMES (Mar. 10, 2022),

without compensation or credit, the imitator is most likely free riding off of the labor of an artist who lacks any representation or bargaining power within the entertainment industry.⁹⁷ Jalaiah Harmon's story is illustrative of this kind of free riding.⁹⁸ Choreographers are only just now creating a union to collectively fight for their rights within the lucrative entertainment industry, aiming first to clarify things like crediting and pay for commissioned choreography.⁹⁹ The newly created group, called the Choreographers Guild,¹⁰⁰ is in its early stages and has nowhere near the clout of the NMPA.¹⁰¹ Any attempt to fight for rights under copyright law for TikTok creators who make choreographic work simply out of a love for dance is unlikely to occur in the near future.

The problem with the delay in action is that real harm is currently being done to creators. TikTok is an example of this harm occurring on an expanding scale. There is a culture of crediting choreographers within the Black-choreographer dominated hip-hop community that exists on the app Dubsmash but does not currently exist on TikTok.¹⁰² When choreography that either originates on Dubsmash, or resembles Dubsmash's hip-hop movement, enters white-dominated dance spaces, norms of crediting choreographers fade away.¹⁰³ Trevor Boffone, in his book *Renegades: Digital Dance Cultures from*

<https://www.nytimes.com/2022/03/10/arts/dance/choreographers-guild.html?smid=em-share> (discussing how other types of artists are in unions and how some dancers who do work in certain industries may fall within the ambit of union protection but how most dancers and choreographers are not protected by unions—thus necessitating the creation of what unionization proponents want to call the Choreographers Guild) [<https://perma.cc/7QQG-VYY2>].

⁹⁷ See *id.* (“‘The people who are creating these dances that are taking over the world, they’ve been done such an injustice,’ said the director and choreographer JaQuel Knight, a supporter of unionization efforts. ‘It’s the undervaluing of both the artist and the art.’”; “‘Hearing stories about these major choreographers that I looked up to having their work being reused in commercials and reused on competition shows and reused on Broadway, without them being compensated or getting credit — it was appalling,’ said Kyle Hanagami, a creative director and choreographer. At the Clubhouse meetings, ‘I think it was a lot of us realizing, ‘Oh, you have the same problems I have. Why are we not working together to fix our problems?’””).

⁹⁸ See Taylor Lorenz, *The Original Renegade*, N.Y. TIMES (Feb 13, 2020), <https://www.nytimes.com/2020/02/13/style/the-original-renegade.html> [<https://perma.cc/62ZF-XA8H>]; see also Introduction *supra* (describing Harmon's story).

⁹⁹ See Fuller, *supra* note 91.

¹⁰⁰ *Id.*

¹⁰¹ See *id.*; see also National Music Publishers' Association, NMPA, <https://www.nmpa.org/> (the NMPA has been in existence since 1917 and thus has a long history of protecting and advancing the interest of music publishers and songwriters) [<https://perma.cc/F79E-SN3B>].

¹⁰² Boffone, *supra* note 6, at 57.

¹⁰³ *Id.*

Dubsmash to TikTok, describes how “the United States has a rich history of Black performers having their work appropriated by White people, [which] . . . extend[s] into contemporary social dance in the digital sphere.”¹⁰⁴ Boffone goes on to note that for these often-marginalized creators, receiving credit “can be a life-changing act.”¹⁰⁵ Yet, when a TikTok celebrity, like Charli D’Amelio, posts a video of herself performing someone else’s choreographic work there is, at best, an unenforceable moral obligation to tag the work’s creator.¹⁰⁶ Most of D’Amelio’s millions of viewers would not so much as notice if she failed to credit a lesser-known creator, let alone call her out for it in any meaningful way; thus, a moral failing like this may not ever come to light.¹⁰⁷ TikTok currently further entrenches a dance culture in the United States that condones free riding off of the creative labor of Black creators and dancers’ inability to collectively bargain. TikTok has allowed this to be permissible within a copyright law regime that wants creators to be able to monetize their labor and work product.

Receiving credit should be the norm rather than a life-changing act. The U.S. copyright regime cares less about a moral right of attribution and more about one’s ability to be monetarily compensated for the reproduction, distribution, and public performance of their work.¹⁰⁸ What Harmon wanted was credit, but what she was actually entitled to was compensation. Attribution is often necessary to facilitate compensation—which the newly created Mechanical Licensing Collective for musical works illustrates through how it identifies the copyright owners of musical works and allows owners to assert claims to musical works so attribution can facilitate royalties distribution under the MMA.¹⁰⁹ Credit is a moral claim for many creators, but, in the eyes of a compulsory licensing scheme, it is a means to a compensation end.

The prospect of owning a copyrighted work likely does not compel one to create a dance composition,¹¹⁰ especially on TikTok, but the lack of enforceable copyright protections for dance compositions is still a problem policymakers should want to fix. In a contemporary information society, copyright promotes predictability and organization in cultural production and enables efficient and just exploitation of creative work.¹¹¹ As it currently stands, TikTok is a largely unregulated marketplace of choreographic works.

¹⁰⁴ *Id.* at 59.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 60.

¹⁰⁷ *See id.* at 64.

¹⁰⁸ Cohen et al., *supra* note 28, at 7.

¹⁰⁹ 17 U.S.C. § 115(d)(3)(C).

¹¹⁰ *See* Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WISC L. REV. 141, 2 (2011); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WISC. L. REV. 141, 2 (2011).

¹¹¹ *Id.*

It is a lucrative one, that, like most unregulated markets, has led to a concentration of power in the hands of a few at the expense of many.¹¹² Popular white creators on TikTok have a monopoly power in that their followings are so massive that other creators cannot effectively compete to popularize their choreographic works.¹¹³ Additionally, those that actually create the choreography that Charli D’Amelio, Addison Rae, and those like them popularize do not have access to the brand deals and sponsorships that these large creators are able to earn revenue from in the exploitation of others’ creative labor. They also cannot earn income through TikTok’s Creator Fund—a pool of money consisting of non-ad-revenue-generated-funds that users with followings of larger than 10,000 get paid from in proportion to video engagement and views.¹¹⁴ TikTok celebrities have a monopoly on the ability to popularize choreographic works and to earn money from those works directly through the Creator Fund and indirectly through brand partnerships.¹¹⁵

Traditional economic rationales for the regulation of a marketplace justify government intervention where a monopoly exists.¹¹⁶ TikTok, then, is no different. A user with a large following may be doing very little original creation but has a large following and makes large sums of money. A smaller

¹¹² See Boffone, *supra* note 6, at 27-28. Almost all users are confronted by members of the “Hype House” on their TikTok For You page, which is illustrative of the idea of power being concentrated in the hands of few. *Id.* Consisting of D’Amelio and other conventionally attractive, white or white-passing influencers, the house is a creative hub where the Gen Z creators continue to grow their followings while creating content with others House members. *Id.* Boffone notes how the House’s domination of the TikTok algorithm has stifled the presence of Black and non-conventionally attractive users on the platform. *Id.* at 29-30; see also Tahniat ALam, *TikTok Influencers: Everything You Need to Know in 2022*, SocialChamp (Aug. 24, 2022), <https://www.socialchamp.io/blog/tiktok-influencers/> (listing 10 famous TikTok influencers and describing what are the criteria for being a famous TikTok influencer) [<https://perma.cc/WYQ8-ZX6K>]. Even the Democratic National Committee is recognizing the power of these select few TikTok influencers. See Taylor Lorenz, *Inside Democrats’ elaborate attempt to woo TikTok influencers*, WASH. POST (Oct. 27, 2022), <https://www.washingtonpost.com/technology/2022/10/27/tiktok-democrats-influencers-biden/> [<https://perma.cc/44FT-7RE5>].

¹¹³ *Id.* at 29-30.

¹¹⁴ *Creator Fund*, TIKTOK, <https://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/creator-fund/> (last visited Apr. 4, 2022) [perma.cc/Q2AV-P8KT].

¹¹⁵ Dan Wheatley, *How Much Money TikTokers Make, According to Creators*, BUS. INSIDER (Mar. 16, 2022), <https://www.businessinsider.com/how-much-money-tiktokers-make-real-creator-examples-2021-7?inline-endstory-related-recommendations=> [perma.cc/B7N5-BJCB].

¹¹⁶ ROBERT BALDWIN ET AL., A READER ON REGULATION, 59 (Oxford Scholarship Online March 2012), <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198765295.001.0001/acprof-9780198765295-chapter-2#:~:text=A%20considerable%20amount%20of%20regulation,to%20by%20economists%20as%20externalities> [perma.cc/X5LL-R3BJ].

creator who is posting original choreography almost exclusively is boxed out of opportunities to go viral and earn the income proportional to their creative labor. Under this framework, Charli D'Amelio's performance of others' choreographic work is monopolistic behavior—she is curtailing her own production of dance compositions (because she can just do other people's dances) but making excessive sums of money by virtue of her access to a huge portion of the market.¹¹⁷ Copyright should want those who are creating the most original choreography to have access to a larger share of the market than those who are creating less and to be compensated in proportion to both their creative labor and the public appeal of their work. Thus, as applied to choreographic works on TikTok, copyright is failing to regulate the marketplace to prevent content monopolies. A system of government-endorsed content monetization, where set royalty amounts must be paid to those who create original choreographic works each time their work is reproduced, will work to ameliorate this problem of inadequate compensation.

Rectifying monopolistic behavior was one of the justifications for the creation of the compulsory mechanical license in the 1909 Copyright Act, since Congress thought that powerful industry players like the Aeolian piano roll manufacturing company should not be the only ones profiting off of musical works.¹¹⁸ Analogously, those with millions of followers should not be the only ones profiting off of choreographic works, especially when the powerful players' access to choreography is facilitated by a platform that ignores who creates and only compensates based on views.

Those possessing entitlements with respect to choreographic works, namely choreographers themselves, lack the bargaining power that the NMPA and other music industry stakeholders have, despite the up-and-coming Choreographers Guild. As such, traditional economic considerations of monopoly power justify the creation of a licensing scheme that will add to the compensation ecosystem on TikTok by putting money into the hands of choreographers irrespective of their follower count. Looking towards the future, the creation of a clear scheme of entitlements and payment of royalties will better allow the new Choreographers Guild to organize and advocate for just compensation because they will have established legal entitlements to fight for under the scheme proposed in Part III.

¹¹⁷ “A monopolist, if unregulated, curtails production in order to raise prices.” *Id.* D'Amelio may not be charging for her dancing in a traditional sense but both the Creator Fund and brand deals and sponsorships allow her to profit off of what she posts. She makes money simply because she posts, not because of posts' original creative content. She will earn whether she creates or not, so there is little incentive to spend time creating choreography if she can make just as much using someone else's dance.

¹¹⁸ ROSS & HUPPE, *supra* note 29, at 53.

III. A COMPULSORY LICENSE FOR CHOREOGRAPHIC WORKS

Making an imitation video of someone else's original choreographic work is like a corporeal cover recording. One is taking the original arrangement of steps someone else has assembled, performing it through their own body, fixing it in video form, and then posting it. Instead of a song, it is a full body performance, as one cannot fix their dance performance in a phonorecord. Outside of these two differences, cover recordings of songs and participation in a TikTok dance imitation challenge are enough alike to make Section 115—which prescribes the mechanical license for musical works—an apt statutory provision upon which to model a choreographic compulsory licensing regime.¹¹⁹

What follows is a proposed legislative solution that will apply to “online digital fixations” of original choreographic works. In this hypothetical scheme, online digital fixations refers to motion picture recordings of choreographic works that are uploaded to internet platforms where the motion picture can be perceived by viewers in a non-analog format.

When original choreographic works are fixed in online digital fixations, the rights holder for the work will be entitled to a statutorily set royalty amount for each imitation of the composition that gets fixed in an online digital fixation. Once an original choreographic work is initially shared by a rights holder through an online digital fixation, the rights holder cannot prevent others from posting their own “covers” of the work, but they are entitled to royalties based on the amount of subsequent online digital fixations that are posted.

There are three possible ways royalty payment could occur: (A) individual users seeking to make imitation videos of choreographic works in online digital fixation format could themselves pay a royalty for use of the dance composition to the rights holder or a designated agent of the rightsholder with default royalty rates set by the Copyright Office and calculated based on the cover's anticipated revenue; (B) platforms themselves could take responsibility for administering the payment of royalties to rights holders of choreographic works posted to their platforms either from funds amassed through the collection of ad revenue or by collecting payment from users seeking to make imitation videos, or through a combination of the two; or (C) a third-party agency could be established to act as an intermediary between

¹¹⁹ Laura Isaacson, *Choreography Copyrights for Moves Published on Social Media* et al., 44 L.A. L. 17 (2021). Isaacson briefly mentions Section 115 in a section proposing non-litigation remedies for creators whose copyright in their choreography has been infringed on TikTok and discusses how the music industry could serve as a blueprint for dancers. I flesh out the mechanics of this proposed solution here and how it could be administered either by TikTok itself or an independent agency resembling the HFA.

rights holders and platforms that could collect funds from platforms for the imitation videos posted and then divide those funds among rights holders in conformance with royalty rates set by the Copyright Office.

A. The Individual User Method

This method would likely fail to adequately compensate rights holders and could over-punish users with small followings who are simply ignorant of copyright law. Large-scale influencers have teams of individuals representing them, including lawyers and talent agencies.¹²⁰ These types of social media users are sophisticated parties with the ability to anticipate what revenue an imitation video might earn, track down a rightsholder or their designated agent, and pay that entity royalties or negotiate a licensing fee for the choreographic work. As it stands now on platforms such as TikTok, there is no incentive for those that represent influencers to engage in this type of due diligence. As such, a legislative framework adhering to this approach of royalty distribution would need to include some form of enforcement mechanism to incentivize those making choreography imitation videos to pay royalties in the first instance. This would likely lead the compulsory license for choreographic works to fall into the same flawed enforcement pattern that the music industry has fallen into with the Digital Millennium Copyright Act (DMCA).¹²¹ The DMCA places the onus on rights holders to track how their own content is being used online and to file takedown requests with online service providers when their works are being infringed.¹²² Putting the burden on creators to advocate for their own rights leads to the under-compensation of small creators that lack the means to constantly monitor their own creative works.¹²³ Further, small-scale creators likely will not register their copyrightable choreographic works with the Copyright Office and thus will be

¹²⁰ Benjamin R. Mulcahy & Gina Reif Ilardi, *Engaging Influencers*, 43 L.A. LAW. 24, 26 (2020).

¹²¹ See Jon Blistein, *Music's Whac-A-Mole Menace: Inside the Outdated, Lopsided DMCA*, ROLLING STONE (Oct. 27 2021), <https://www.rollingstone.com/music/music-features/dmca-youtube-twitch-spotify-apple-1239258/> [perma.cc/YYP6-44BG]. “The DMCA has created a landscape that . . . makes it exceedingly difficult for anyone in music to track and monitor their copyrights,” and companies like YouTube and TikTok have been able to leverage their DMCA insulation from copyright liability “to set outrageously low payouts to the rights holders of . . . music.” *Id.* This article goes on to describe small artists petitioning for the takedown of illegal uploads of their works as being “like playing a torturous game of Whac-A-Mole,” because new infringing uploads are always popping up. *Id.*

¹²² 17 U.S.C. §§ 512(c)(3), (g); *see id.*

¹²³ *See* Blistein, *supra* note 116.

attempting to assert a right to compensation against others that is nebulously defined without a stamp of approval in the form of a registration.¹²⁴

Missing an instance of infringement means allowing infringement to persist. On TikTok, where an algorithm shows you what it thinks you want to see on your “For You” page,¹²⁵ it can be all the more difficult to locate videos that infringe one’s copyrighted work. This implementation of a choreographic compulsory license may lead to the takedown of videos by small users who have no intent or ability to cause commercial harm to the rightsholder because a powerful party would have the tools to strip the internet of all iterations of their work. The proposed license seeks to prevent others from earning money by free riding off of someone else’s labor. A version of it that primarily punishes users who have no intention of earning any money off of what they post would run counter to the social and participatory nature of dance as an art form and misses the point of regulating choreographic covers altogether. Further, takedown might not be the right solution here. Because so much of TikTok dance culture involves dance challenges and imitation videos, takedown will vitiate the very incentives choreographers have for making and posting dances on TikTok in the first place. For many, imitation is the goal. Choreographers like Jalaiah Harmon want credit and compensation,¹²⁶ not takedown procedures that discourage others from dancing.¹²⁷

B. The Platform Method

The second scenario for royalty distribution, where platforms themselves take responsibility for administering the payment of statutorily set royalties to users, could be a better way to realize a compulsory license for choreography but is not without flaws. A version of this could require creators to make “dancer” accounts on TikTok and similar platforms where they post

¹²⁴ In this vein, the MLC for musical compositions does not eliminate the need to register copyright to be entitled to the full spectrum of statutory royalties one can earn from a musical work. *See* 17 U.S.C. § 115(c)(1)(A) (“To be entitled to receive royalties under a compulsory license obtained under subsection (b)(1) the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.”); <https://www.copyright.gov/music-modernization/faq.html>. Registration of copyright in choreographic works will be essential to making sure choreographers are receiving appropriate shares of revenue.

¹²⁵ Cong. Rsch. Serv., *TikTok: Technology Overview and Issues*, 1-2 (September 25, 2020), <https://crsreports.congress.gov/product/pdf/R/R46543/2> [perma.cc/4S95-HPST].

¹²⁶ Credit under a compulsory licensing scheme is more a means to compensation through royalty payouts, rather than a moral right.

¹²⁷ *See* Taylor Lorenz, *supra* note 10.

original choreographic works.¹²⁸ Dancemakers could, alternatively, identify videos they post on multi-purpose accounts as “original choreography,” if they choose not to have one TikTok account solely for dance. If someone is posting an imitation video, the screen users view right before they upload content could be amended to prompt users to tag the choreographer they are imitating. This would disrupt the status quo, as right now, crediting choreographers is purely voluntary. Encouraging users to tag choreographers by including it as an option in the posting process will not only vindicate the moral rights’ failings inherent in the choreographic copyright infringement that currently exists online, but it will also allow algorithms, notably TikTok’s proprietary algorithm, to account for how many times a choreographer is tagged and distribute royalty payments to the choreographer based on the number of tags. TikTok’s algorithm, though elusive in many respects, already has the ability to track user engagement with posts,¹²⁹ so using tags as a proxy for tallying the amount of “choreographic covers” created based on a dance composition could be an effective means of compulsory license administration.

The enforcement of this second compensation technique may also resemble DMCA takedowns, though perhaps in a less erratic way. Ideally, algorithms or content moderation teams would be able to identify a choreographic imitation that has been posted without adequately crediting the self-identified creator of the choreographic work—picking up on combinations of moves that do not appear to be unique when compared to other popular choreographic works on the platform and removing those videos until they are appropriately credited. These instances of identified infringement should also be included in the computation of royalties. If TikTok moderators already have the ability to restrict the viewership of videos made by users who are not conventionally attractive, it seems likely apps can do more to takedown instances of uncredited choreographic covers within this proposed scheme.¹³⁰ In addition, choreographers could report instances of

¹²⁸ This is not unlike TikTok’s new SoundOn initiative, where “artists . . . can upload their music directly to TikTok, making it into a sound that can be used by any content creator on the app, and the music creator will begin earning royalties when that sound is used. *TikTok Launches SoundOn to Let Musicians Make Money—But Is That a Good Thing?*, SOCIALSTUDIES (May 25, 2022), <https://socialstudies.io/articles/tiktok-launches-soundon-to-let-musicians-make-money-but-is-that-a-good-thing/#:~:text=Basically%2C%20artists%20can%20now%20upload,when%20that%20sound%20is%20used> [<https://perma.cc/PP42-R4CW>].

¹²⁹ See *Creator Fund*, *supra* note 109.

¹³⁰ See Sam Biddle, Paulo Victor Ribeiro, & Tatiana Dias, *Invisible Censorship*, THE INTERCEPT (Mar. 16, 2020), <https://theintercept.com/2020/03/16/tiktok-app-moderators-users-discrimination/> (“One moderation document outlining physical features, bodily and environmental, deemed too unattractive spells out a litany of flaws that could be grounds for

infringement to the platform themselves, as current DMCA notice and takedown procedures instruct, and the video could similarly be removed until appropriately credited for royalty computation purposes. Whether platform-identified or choreographer-identified, those who are accused of posting infringing choreographic covers should be given the ability to contest the removal of their videos to protect expression in instances of independent creation or (algorithmic) moderator error.

Though TikTok and other platforms likely have the infrastructure in place to account for how much engagement an original choreographic work attains and to compute shares of platform ad revenue in proportion to the number of tagged imitation videos created based on the work,¹³¹ this method could still lead to choreographer under-compensation. Cynically, imposing a duty on a platform that currently profits off of infringement to enforce a system meant to prevent infringement may incentivize lax administration of the proposed compulsory licensing scheme. TikTok has an incentive to take an extremely narrow view of what constitutes an imitation video. It is to their benefit to view uncredited covers as new original choreographic works based on the most minor of stylistic modifications to the choreography. This narrow view would be easy to justify because copyright in choreographic works is thin. The less a choreographic work is covered by other users, the less TikTok would have to pay out of their own revenue.

Further, a platform-administered solution cannot account for infringement that occurs when a choreographic work migrates from one platform to another, as was the case with Jalaiah Harmon. She posted her video to Funimate and Instagram, then another user moved it to TikTok without crediting her, spurring even more infringement.¹³² A compulsory license administered by platforms themselves would need to become incredibly intricate to protect creators like Harmon in instances of platform migration. It would lead to separate and distinct copyright enforcement schemes on each privately-owned platform, creating an administrative nightmare for the Copyright Office and creators aiming to share their work across multiple platforms. This platform-administered solution would also fail to motivate copyright owners to register their choreographic works with the Copyright

invisibly barring a given clip from the “For You” section of the app, where TikTok videos are funneled to a vast audience based on secret criteria.”] [<https://perma.cc/L6UQ-H8PQ>].

¹³¹ See *Creator Fund*, supra note 109 (“A number of factors influence how funds are calculated for videos under the [Creator Fund] program. These elements include video views, video engagement, as well as ensuring the videos adhere to the Community Guidelines and Terms of Service.”) (TikTok is already tracking engagement and compliance with community standards for those users that fall within the Creator Fund program. It seems likely that this technology could be deployed for original creative works, as well.).

¹³² Lorenz, supra note 10.

Office, which is a tool choreographers could use to advocate for the enforcement of their clearly established legal entitlements.

For this reason, a third-party agency, established for the purpose of administering the choreographic compulsory license and acting as an intermediary between dance-sharing platforms like TikTok and individual rights holders in choreographic works, would be the optimal method for ensuring the adequate distribution of royalties.

C. The Third-Party Agency Method

As discussed in Part I.B., the mechanical license for musical compositions in Section 115 of the Copyright Act is administered by the Harry Fox Agency (HFA)—which is designated as the agent of rights holders that register with the agency. The HFA both collects and distributes royalties from those who make cover recordings of compositions within the catalog of rights holders registered with the agency.¹³³ An agency similar to the HFA could be created to administer a compulsory license for choreographic works. This agency would likely be a nonprofit entity designated by the Library of Congress to collect and distribute royalties based on this compulsory license. It may look similar in organizational structure to SoundExchange, which is the nonprofit performance rights organization that administers the statutory license for sound recordings for noninteractive digital streaming services.¹³⁴ It may also look like the Mechanical Licensing Collective (MLC), which was created through the Music Modernization Act of 2018.¹³⁵ The MLC currently works in collaboration with the HFA to build its catalog, administers blanket mechanical licenses to eligible streaming and download digital service providers, collects data and royalties from participating digital services, matches streams to MLC members who have registered their works, and pays members royalties based on streams.¹³⁶

¹³³ See FAQs, THE HARRY FOX AGENCY LLC, <https://www.harryfox.com/#/faq> (last visited Apr. 4, 2022) [<https://perma.cc/7T8B-EU6M>]. See FAQs, THE HARRY FOX AGENCY LLC, <https://www.harryfox.com/#/faq> (last visited Apr. 4, 2022) [<https://perma.cc/7T8B-EU6M>].

¹³⁴ ROSS & HUPPE, *supra* note 29, at 313; see also *SoundExchange*, SOUNDEXCHANGE, <https://www.soundexchange.com/> (last visited Apr. 4, 2022) [<https://perma.cc/R7JL-BD83>]; “Who we are,” <https://www.soundexchange.com/who-we-are/#about-us> [<https://perma.cc/72YL-S226>]; “What We Do,” <https://www.soundexchange.com/what-we-do/> [<https://perma.cc/MSD8-4FQJ>].

¹³⁵ *Frequently Asked Questions*, THE MLC, <https://www.themlc.com/faqs/categories/mlc> (last visited May 11, 2022) [<https://perma.cc/9EQA-SKZ2>].

¹³⁶ *Id.*; *How it Works*, THE MLC, <https://www.themlc.com/how-it-works> (last visited May 11, 2022) [<https://perma.cc/7658-YQ65>].

Under this proposed scheme, creators would first register their works with the designated third-party agency.¹³⁷ This could be accomplished through a collaboration between the agency and online platforms where, in the process of posting, one could check a box agreeing to submit their work to the agency. The agency could then verify that the work is, in fact, a work of original choreographic expression entitled to copyright protection.¹³⁸ When someone seeks to make a subsequent video of someone else's choreographic work, platforms could still require creator tagging, as would also be the case in the platform-administered system. Here, though, platforms would be required by law under the amendment to the Copyright Act creating this compulsory license to do a periodic accounting of the number of tags each agency-registered composition receives and provide this data to the agency. The agency would then use this data to collect payment from platforms and compensate rights holders in statutory royalty amounts set by the Copyright Office. Platforms should implement procedures to discipline those who make unauthorized or uncredited choreographic covers and attempt to include these covers when reporting to this HFA or MLC-like body.

In addition to reporting unlicensed uses of choreography to the platform itself, rightsholders could also have the ability to file complaints with this agency. This could be a way to protect those like Jalaiah Harmon whose work posted on one platform gets infringed on a different site from where the initial online digital fixation took place. The agency could advocate on behalf of creators like Harmon with platforms so choreographic works not initially posted on the platforms where they become popular are still considered in content moderation and accounting/choreographic cover-tallying regimes.

After periodically reporting how many choreographic covers have been posted for each work, the platforms that host the covers would then be told by the agency how much rightsholders in total have earned in choreographic compulsory license royalties on their site or app. The platforms

¹³⁷ This registration scheme would operate in a manner similar to the MLC. *See Frequently Asked Questions*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/music-modernization/faq.html> (last visited Jan. 4, 2023) (“Musical works do not need to be registered with the Copyright Office to be eligible for certain statutory royalties paid through the MLC. However, to obtain statutory royalties for certain non-digital uses (e.g., CDs, vinyl), your musical works must be in the Copyright Office’s records, which may be accomplished through registration. Registering a work for copyright does offer certain additional protections, such as the ability to pursue statutory damages and attorneys’ fees in infringement lawsuits.”) [<https://perma.cc/F5LW-SD4F>].

¹³⁸ The scheme proposed here may go even further than the MLC does, though, because it verifies that a work is, in fact, an original work of choreographic expression. As such, it may be beneficial to collapse registration of a copyright in the choreographic work with the Copyright Office and registration with this MLC-like agency into one process—registration with the agency could equal copyright registration.

would pay the agency a lump sum that would then be distributed to the rightsholders (this lump sum would probably be accompanied by a small administration fee to cover agency overhead costs added to what platforms pay the agency). The platforms can decide for themselves where this lump sum payment would come from. It could come from ad revenue, a flat fee for downloading the app, a monthly fee for a subscription (like a Spotify-type service), or they could charge users per choreographic cover. How platforms like TikTok choose to pay creators through this neutral, third-party, non-profit agency is entirely up to them in this system of royalty distribution. Platforms will be given the freedom to integrate this change to the copyright regime into their business model while also outsourcing the labor of keeping track of every individual rightsholder to an outside agency.

If this agency is able to act as a true intermediary between dance-hosting platforms and choreographers from all genres, skill levels, and degrees of notoriety, it could reduce the strain on platforms in administering this new compulsory license while effectively compensating choreographers. As such, administration through a third-party agency, rather than through platforms themselves or through an individual user per-cover direct payment system, would likely be the best method of administering a compulsory license for original choreographic works fixed in online digital fixations.

IV. DO DANCERS AND CHOREOGRAPHERS REALLY NEED THIS?

Dance has often been thought of as a black sheep in copyright's protection of the arts¹³⁹ because the art form has been so difficult to protect legally and because artists have been both reluctant and logistically unable to register and then enforce their rights.¹⁴⁰ Prior to the Internet age, customs within the dance community were thought to be the best form of protection against unauthorized copying.¹⁴¹ At least within concert dance spaces, dance companies consult with, or at the very least ask permission from, choreographers or their representatives before performing works that do not originate within the dance company itself.¹⁴² Often, some sort of contract follows, though these contracts are almost never enforced through litigation.¹⁴³

¹³⁹ 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 (1984).

¹⁴⁰ See VAN CAMP, *supra* note 38 at 80.

¹⁴¹ Singer, *supra* note 139, at 290.

¹⁴² *Id.* at 293-94 (This usually is followed by a visit by the choreographer or their representative to ensure that the company is, in fact, capable of performing their work in accordance with their creative vision); *Id.* at 294.

¹⁴³ See *id.* at 294-96 ("Few choreographers consider seeking a legal remedy for breach of a licensing contract."); see also VAN CAMP, *supra* note 38, at 75 ("this community and its

This is mostly because the risk of reputational damage within the concert dance community is enough to compel adherence to norms of credit and choreographer control.¹⁴⁴ In concert dance styles, like ballet and modern dance, these norms evolved with the evolution of the art form itself, largely because technological limitations meant the only way to restage a choreographic work was to involve someone who already knew the choreography and could teach others.¹⁴⁵

Online, however, norms of credit and compensation are evolving in an *ex post facto* way—meaning that it is taking peer pressure at best and public shaming at worst to lead dancers doing choreographic covers to credit those who made the very dance compositions they perform.¹⁴⁶ This credit has not yet led to substantial compensation for most viral online dance creators. Should we wait for norms to evolve instead of implementing what is, concededly, a complicated compulsory licensing scheme? While customs of giving credit may open the door to increased opportunities for many choreographers, credit alone does not equal adequate compensation in proportion to how popular a dance challenge, like the Renegade, may be.¹⁴⁷

The most compelling argument against a compulsory license for choreography is that it will lock up too much choreography in content monopolies and thus stifle creativity.¹⁴⁸ Much like musical works, however,

unwritten "rules" concerning respect for not stealing each other's works perhaps explains why so few infringement suits have been brought in the courts.").

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 293 n. 22-24.

¹⁴⁶ *See Boffone, supra* note 6, at 60-62 ("[D]igital communities have found ways around the issues of crediting, in lieu of securing legal copyright remains an issue. For Dubsmashers and Instagram dancers, it's best practice to tag the accounts of both the musicians and the dance creators in any given video. Doing so increases searchability and digital connectedness, but dancers also use hashtags to help track a dance's history, a process that can more efficiently lead back to the dance's creator. On TikTok, however, the unstated cultural norm is for dancers to post a video and not tag anyone.").

¹⁴⁷ *See id.* at 57 ("It is no secret that going viral is no longer about becoming popular for a moment. Going viral is about clout and making money; therefore, "to be robbed of credit on TikTok is to be robbed of real opportunities."20 Creators of viral dances often go viral themselves, quickly gaining large follower accounts across their social media platforms. As these content creators go from anonymity to fame, they become influencers and gain the perks that come with the title, namely sponsorship deals, brand deals, media opportunities, and, perhaps the most decisive thing, clout.").

¹⁴⁸ *See* Joi Michelle Lakes, *A Pas de Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1834 (2005) (citing STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT L. REVISIONS: STUDIES 113 (Comm. Print 1961) (comments by Lincoln Kirstein)) ("Because granting property rights to choreographers and maintaining the public domain are both so intimately connected with the constitutional goals of progress and innovation within copyrightable subject matter, a balance must be created between the two. Without this balance, innovation will be curtailed.").

the solution proposed here is predicated on a thin copyright in an original combination of preexisting material; here, the material is dance steps. Additionally, in the ideal administration of the choreographic compulsory license, where a third-party agency determines what choreographic works fixed in online digital fixations should be protected and then distributes royalties collected by online platforms, those conversant in dance techniques would make determinations of what constitutes an original choreographic work. They will also be able to track different combinations of steps as they rise in popularity across social media.

Anthea Kraut suggests certain social dance steps are likely excluded from copyright protection because “government officials have been disinclined to grant exclusive rights in participatory forms of dance that would give one individual the power to restrict the movements of others, effectively inhibiting participation.”¹⁴⁹ However, a compulsory license is an effective response to this concern. A rightsholder under the regime proposed in Part III will be unable to prevent anyone from posting a video of themselves doing the rightsholder’s work. The compulsory licensing scheme I propose for choreographic works does not intend to impose a level of choreographic control onto participation-based social media platforms, like TikTok, akin to the customary control asserted by traditional ballet and modern concert dance choreographers in subsequent restagings of their work.¹⁵⁰ It seeks to instead ensure norms of crediting choreographers that are evolving on their own equate to actual profit for those who engage in the creative labor of making a viral dance challenge.

On social media, followers equal influence, and influence is lucrative.¹⁵¹ For this reason, credit is not enough.¹⁵² Simply put, brands are not flocking to the creators Charli D’Amelio and Addison Rae tag in their dance videos to the extent that they are trying to make deals with D’Amelio and Rae themselves.¹⁵³ For whatever confluence of reasons, certain TikTok users have a greater amount of followers than others, and those with larger followings can popularize choreographic works more than small-scale creators. Popularizers make large sums of money—and that is their prerogative—but that should not mean the creators should go unnoticed and uncompensated. When this is the case, copyright fails to provide a monetary incentive for the increased production of creative works.

¹⁴⁹ Anthea Kraut, “Stealing Steps” and Signature Moves: Embodied Theories of Dance as Intellectual Property, 62 THEATRE JOURNAL 173, 178, Johns Hopkins University Press (May 2010).

¹⁵⁰ See Singer, *supra* note 139, at 293-94.

¹⁵¹ Boffone, *supra* note 6, at 57.

¹⁵² *Id.* at 57-58.

¹⁵³ See *id.* at 58.

CONCLUSION

Choreographic works will continue to be created and built upon whether or not there are economic incentives and rewards for such creation. This phenomenon is why choreography jurisprudence has not developed analogously to copyright litigation about other art forms. The commodification of choreography on TikTok as a result of the more expressive nature of Gen Z and their desire to create content rather than just passively participate in social media has the potential to usher in a new era of copyright for dance.¹⁵⁴ Much like how Congress created the mechanical license for musical works to ensure powerful players could not monopolize the reproduction and distribution of musical works, today's federal legislature should work to limit the monopoly TikTok users like Charli D'Amelio have on the ability to popularize choreographic works—especially as it is tied to the undercompensation of creators from historically marginalized groups. Government intervention is needed for profit distribution in the social media dance marketplace to reflect the cost to society of producing the choreography that has gone viral among Gen Z consumers and because of Gen Z creators. A compulsory license for choreography could answer the question of what this profit redistribution should look like. Compulsory licensing walks the appropriate line between allowing those with massive followings to profit off of their audiences and creating a form of compensation that coincides with creative labor. It creates space for the Charli D'Amelios and the Jalaiah Harmons within an economic conception of copyright.

¹⁵⁴ See Bradian Muliadi, *What the Rise of TikTok Says About Generation Z*, FORBES (July 7, 2020), <https://www.forbes.com/sites/forbestechcouncil/2020/07/07/what-the-rise-of-tiktok-says-about-generation-z/?sh=69e136096549> [https://perma.cc/58S5-RDFA].