DANCE LIKE EVERYONE IS WATCHING: WHY TIKTOK CHOREOGRAPHY AND COPYRIGHT AREN'T IN SYNC

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INTRODUCTION

TikTok dance is a global phenomenon. Since the launch of the app in 2018,[1] swarms of users across the world have viewed, participated in,

[1] Deborah D'Souza, *TikTok: What It Is, How It Works and Why It's Popular*, INVESTOPEDIA, https://www.investopedia.com/what-is-tiktok-4588933 [https://perma.cc/TVR2-496M] (last updated Aug. 14, 2023).

and created "viral" TikTok choreography.[2] There is a misconception that TikTok dance videos are solely "for bored teens in their bedrooms . . . ."[3] In reality, many of the app's most famous dances are choreographed by industry professionals.[4] Nevertheless, regardless of the dances' origins, viral choreography has been the recent subject of legal and social controversy as the intellectual property world scrambles to protect internet dance.

This Note provides a framework for assessing the copyrightability of viral choreography on the social media platform TikTok, the issues associated with this protection, and other options that may be available to content creators to ensure they receive compensation and attribution for their dance works. Part I provides a history of TikTok as well as choreography copyright and its intended scope. This Part will also provide a look into the cultural phenomenon of viral dance and the ways that content choreographers have begun to deal with such issues.

Part II introduces the differences between traditional choreography and viral dance. This Part will then argue that viral dance should not be protectable under the Copyright Act, because its rapid dissemination and social nature are not compatible with the definition or purposes of the Act. This Part also discusses which individuals are most affected by the issues copyright poses to viral choreography and why low-income creators and creators of color would be disproportionately disadvantaged by these protections.

Part III sets forth current options for attribution and compensation for choreographers that do not stem from copyright protection. This Part examines the steps TikTok has already taken to reward creators for their popular contributions to the app and why these contributions have been largely ineffective so far. Further, this Part explains why existing copyright principles and exceptions like fair use and licensing, and adjudicatory bodies like the Copyright Claims Board do not fully address the needs posed by viral dance.

Lastly, Part IV of this Note proposes the implementation of statutory requirements outside of copyright to ensure TikTok creators are rewarded for their talents and effort. The analysis in Part IV will also contemplate the difficulties that such statutory requirements would pose. This Note concludes with the importance of these implementations, despite their

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2 *See* Adam Connell, *32 Latest TikTok Statistics for 2022: The Definitive List*, BLOGGINGWIZARD, https://bloggingwizard.com/tiktok-statistics/ [https://perma.cc/TG7F-995F] (last updated Oct. 26, 2022).

3 Amelia Tait, *Meet the Choreographers Behind Some of TikTok's Most Viral Dances*, WIRED (Oct. 8, 2020, 6:00 AM), https://www.wired.co.uk/article/tik-tok-dances [https://perma.cc/J6KL-Y3KY].

4 *Id.*

difficulties, and the effect that they could have on the legal and techno-social worlds for years to come.

I. TIKTOK AS A PLATFORM FOR VIRAL DANCE

Viral dance is a product of the viral video.[5] Viral videos are spread across the internet at a speed and distribution rate that can reach millions of people per day.[6] On the social media app TikTok, these videos can contain any kind of content, from "quarantine cooking ideas" to dance and choreography.[7] However, this near-instantaneous fame does not come without its problems. TikTok choreography has already been the subject of federal litigation and frequent debate by choreographers and social activists both on and off the app.[8] It's unlikely that these problems will disappear anytime soon; viral dance's ability to attract massive revenue streams for TikTok and individual influencers suggests that TikTok choreography is more than just a passing fad.[9]

Further, TikTok's recent growth and popularity demonstrate how choreography on viral video apps can have both an economic and artistic impact for dancers and non-dancers alike.[10] In just seven years, TikTok has been downloaded over three billion times and has over one billion active users.[11] It was the most downloaded app of 2021, following a large surge in popularity brought on during the COVID-19 pandemic.[12] One of the top searched content categories on the app is "dance," gaining over 181 billion views in total and second only to the category "entertainment."[13] This popularity resulted in a 2022 valuation of the app, which reached $75 billion, and a revenue stream that exceeded $1.56 billion in quarter three of the same year alone.[14]

Further, United States influencers are some of the most popular TikTok users across the world.[15] This encourages sponsorships and

5 *See* Jessaline Tanjung, *How TikTok's Viral Dance Challenges Taught Me More Moves Than My Dancing Instructor*, DIGGIT MAG. (Sept. 2, 2021), https://www.diggitmagazine.com/articles/how-tiktok-s-viral-dance-challenges-taught-me-more-moves-my-dancing-instructor [https://perma.cc/ZB2T-MRFP].

6 *See How Many Views Is Viral? The Answers to Your Questions*, LEVITATE, https://levitatemedia.com/learn/viral-video-views [https://perma.cc/J8PA-VKFU] (last visited Feb. 2, 2023).

7 Tanjung, *supra* note 5.

8 *See Hanagami v. Epic Games Inc.*, LOEB & LOEB LLP (Aug. 24, 2022), https://www.loeb.com/en/insights/publications/2022/09/hanagami-v-epic-games-inc [https://perma.cc/97VZ-RB56].

9 *See* Jack Shepherd, *20 Essential TikTok Statistics You Need to Know in 2022*, SOC. SHEPHERD, https://thesocialshepherd.com/blog/tiktok-statistics [https://perma.cc/AND9-XQU2] (last updated Oct. 5, 2022).

10 Tait, *supra* note 3 (quoting choreographer Greg Chapkis, "Social media and TikTok changed everything in our industry. . . . It's crazy that so many dancers and people that don't dance got moved by it.").

11 Shepherd, *supra* note 9.

12 *Id.*

13 *Id.*

14 *Id.*

15 *See List of Most-Followed TikTok Accounts*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of

advertisers to seek U.S. influencers to promote brands on their platforms.[16] "Data shows that influencers in the U.S. have an engagement rate of nearly 18%. That's a good reason for brands to give TikTok a shot."[17] Perhaps surprisingly, it actually isn't necessary for a promoter to have millions of followers to effectively sell products.[18] "In fact, engagement seems to be higher for micro-influencers (those with less than 15,000 followers)."[19] Therefore, sponsorships with mega-stars and more niche creators alike can be an effective way for brands to promote their products without hiring marketing teams and spending large amounts of time and money in creating their own advertisements. This is further exemplified by the fact that the app's large population of millennial users have been found to be 2.3 times more likely to tag a brand in their post than any other platform users.[20]

It is also true that, unlike YouTube, TikTok users don't get to share in the advertising revenue on the platform.[21] This means that there is no intermediary between brands and influencers and that they must set their own terms and rates.[22] It also means that TikTok pockets all of its own in-app advertising revenue.[23] However, TikTok users have found other means of earning money from the app.[24] Since TikTok dancers and choreographers are some of the most-followed individuals on the app, they often receive more opportunities for sponsorship and brand partnership, and can make thousands of dollars per video by promoting brands and goods on their own page to their social following.[25] Selling merchandise, live-streaming, and attending sponsored events can all be additional sources of income for popular influencers or creators.[26]

Another group—musicians, both new and well-recognized—have benefited from the popularity that TikTok choreography has brought their work.[27] For example, in 2020 pop star Kesha's 2010 song "Cannibal" saw

_most-followed_TikTok_accounts [https://perma.cc/S3W9-WRPU] (last visited Sept. 21, 2023).

16 *See* Shepherd, *supra* note 9.

17 *Id.*

18 *See* Jessica Martel, *16 Ways to Make Money on TikTok in 2024*, TIME, https://time.com/personal-finance/article/ways-to-make-money-on-tiktok/[https://perma.cc/7REP-ZJ98] (last updated Jan. 4, 2024) ("If you're a TikTok influencer, a micro- or a nano-influencer (between 10,000 and 1,000 followers respectively), you can work with brands to create sponsored posts.").

19 *Id.*

20 *Id.*

21 Werner Geyser, *TikTok Money Calculator [Influencer Engagement & Earnings]*, INFLUENCER MKTG. HUB, https://influencermarketinghub.com/tiktok-money-calculator/ [https://perma.cc/KZ74-A4MW] (last updated Mar. 22, 2023).

22 *Id.*

23 *See id.*

24 *See id.*; Alyssa Gagliardi, *11 Ways Influencers & Creators Can Make Money in 2024*, LATER, https://later.com/blog/how-content-creators-make-money/ [https://perma.cc/3ZTF-W7WX] (last updated Jan. 4, 2024).

25 Geyser, *supra* note 21.

26 Gagliardi, *supra* note 24.

27 *See* Andria Moore & Palmer Haasch, *20 of the Most Viral Dances on TikTok, from 'Corvette*

a resurgence in popularity after 14-year-old Briana Hantsch posted her own original choreography to the song.[28] Further, shortly after Megan Thee Stallion dropped her single, "Savage," in 2020, creator Keara Wilson's corresponding dance rose to fame.[29] The dance now has over 26.8 million attempts on the app.[30] "It skyrocketed 'Savage,' from Megan Thee Stallion's new album, *Suga*, landing it at No. 1 on the iTunes Hip-Hop/Rap chart, unseating 'The Box' by Roddy Ricch."[31]

In the past several years, growing unrest over compensation for content contribution has prompted many creators, particularly creators of color, to speak out and log off.[32] After TikTok's fourth most-followed influencer, Addison Rae,[33] performed several viral TikTok dances on The Tonight Show with Jimmy Fallon, she received a large amount of backlash from the creators of the dances and other TikTok users.[34] Rae, a white woman, performed eight dances, most of which had been choreographed by creators of color.[35] Due to the large amount of criticism Rae and Fallon received, the original content creators were invited to join a later episode of Fallon's show, though their appearance was joint and virtual.[36] One of the creators to join Fallon's show was Keara Wilson, who now has a registered copyright in her viral TikTok dance.[37] Securing registration eases the process of filing for copyright infringement if Wilson's work is copied by other users like Rae without authorization.[38]

Corvette' to the 'Renegade', INSIDER, https://www.insider.com/tiktok-dances-renegade-say-so-and-more-19-top-2020-3 [https://perma.cc/7EH8-TYXG] (last updated Feb. 5, 2021, 4:50 PM); *see also* Zoe Haylock, *It Only Took Five TikToks to Make Megan Thee Stallion's 'Savage' Go Viral*, VULTURE (Mar. 24, 2020), https://www.vulture.com/2020/03/megan-thee-stallion-savage-dance-watch-best-videos.html [https://perma.cc/2VWL-23UW].

28 Moore & Haasch, *supra* note 27.

29 *Id.*

30 *Id.*

31 Haylock, *supra* note 27.

32 *See* J. Clara Chan, *Black TikTok Creators Grapple with How Far to Take Strike: "Why Should We Have to Leave?"*, THE HOLLYWOOD REP. (July 28, 2021, 10:23 AM), https://www.hollywoodreporter.com/business/digital/tiktok-strike-1234988427/ [https://perma.cc/TYU8-6FXS]; *see also* Hannah Yasharoff, *Jimmy Fallon Addresses His TikTok Dance Segment with Addison Rae. Here's Why It Sparked Backlash*, USA TODAY, https://www.usatoday.com/story/entertainment/tv/2021/03/30/tiktok-dances-why-addison-rae-jimmy-fallon-clip-sparked-backlash/7058920002 [https://perma.cc/PK8D-CUUA] (last updated Apr. 6, 2021, 12:57 PM).

33 Ava Thompson-Powell, *Top 20 Most Followed TikTok Accounts: Charli D'Amelio, Addison Rae & More*, DEXERTO, https://www.dexerto.com/entertainment/top-20-most-followed-tiktok-accounts-loren-gray-charli-damelio-more-1326252/ [https://perma.cc/Y5GC-D382] (last updated Jan. 3, 2024).

34 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/oif/literally-stealing-the-show-a-brief-and-recent-history-of-dance-copyright/ [https://perma.cc/BG2T-NRVM].

35 Chan, *supra* note 32.

36 *Id.*

37 Brittany Nanton, *Keara Wilson, Creator of #SavageChallenge, Receives Copyright for her Viral Dance,* GIRLS UNITED (July 30, 2021), https://girlsunited.essence.com/article/keara-wilson-copyright/ [https://perma.cc/6LQH-UZRD].

38 *See* 17 U.S.C. § 501(b) ("The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

Following this situation and increased dialogue about the platform's lack of protections[39] for content creators, specifically those of color, Black content creators executed an experimental protest, which began in June of 2021.[40] Shortly after Megan Thee Stallion's song "Thot Shit" was released, numerous Black TikTok users went on a "dance strike" and refused to choreograph any movement to the song's upbeat, catchy lyrics.[41] The strike was described by some as "an 'experiment' to highlight just how significant the contributions from Black creators are to viral trends on the app."[42] They intended to show "what would happen if they refused to create new dances to the song."[43] Though not every Black TikTok user took part in the strike, it did succeed in drawing more attention to the plight of content creators of color on the app.[44] Frustrations of Black creators, like 21-year-old Erick Louis, were finally heard: "[w]e drive all this traffic to the app. We run the trends, we run all the subcategories, yet we're not propped up in the same ways that a lot of these white content creators are . . . ."[45] For Louis, the protest was more than a dance strike.[46]

Claimed viral dance infringements have also triggered growing unrest outside of the TikTok community, expanding to other forms of technological entertainment, like gaming.[47] In 2020, choreographer Kyle Hanagami sued Epic Games for a Fortnite "emote" (animated movement) which he claimed constituted copyright infringement of his viral dance to singer Charlie Puth's "How High."[48] Hanagami lost the suit; the District Court found that his series of steps were "identical to the emote but unprotectable" in their expression.[49] Hanagami's suit will likely not be the last of its kind, with dissemination of media and video becoming easier with every new technological advancement.[50]

Additionally, the nature of TikTok choreography is beyond the traditional expectations of copyrightable subject matter and can only serve its true purpose separate from copyright. Copyright was introduced by the founders of the Constitution in Article 1, Sec. 8, Clause 8 for a singular, specific purpose: "[t]o promote the Progress of Science and useful

39 *See* discussion *infra* Part III.A.2.
40 Chan, *supra* note 32.
41 *Id.*
42 *Id.*
43 *Id.*
44 *See* Yasharoff, *supra* note 32.
45 Chan, *supra* note 32.
46 *Id.*
47 *See Hanagami v. Epic Games Inc.*, *supra* note 8.
48 *Id.*
49 *Id.*
50 Prateek Saxena, *5 Technologies Taking Social Media Towards Its Next Evolution Set*, APPINVENTIV (June 6, 2022), https://appinventiv.com/blog/technologies-making-social-media-better/ [https://perma.cc/K4D4-NZJG].

Arts . . . ."[51] Therefore, to align with the founders' intentions, the act of granting copyright should be weighed against a work's ability to promote societal progress.[52] If a work is not benefited by its protection under the Copyright Act, then it undermines the original intention of the founders.[53]

Some have expressed their disapproval for any protective expectations after posting choreography that is intended to be replicated on social media platforms.[54] Is simply knowing one's work was appreciated worldwide enough? "It's a persistent question on the app, one that even celebrities have weighed in on: 17-year-old Disney Channel actress Skai Jackson recently asked why it was important to credit viral dance creators since 'you should be happy that millions of people are doing the dance . . . .'"[55] But others disagree with Jackson's thinking.[56] Creators have opined that granting artistic credit "translates to massive opportunities for creators if the right people know who did it."[57]

The most famous viral TikTok dance to date is the "Renegade," choreographed by a 14-year-old Black creator, Jalaiah Harmon, in 2019.[58] The dance was popularized on TikTok by white influencer Charli D'Amelio[59] and has been tagged in 30 million videos across the world.[60] While D'Amelio has been known to earn up to $100,000 per post and was recently invited to participate in ABC's *Dancing with the Star*s, Harmon was forced to beg influencers for dance credit in video comments, where she was ignored and ridiculed.[61]

TikTok choreographers like Harmon deserve accreditation because their work is more than a passing fad.[62] In the United States, one quarter of TikTok's users are between the ages of ten and nineteen, and 22.4%

51 U.S. CONST. art. 1, § 8, cl. 8.
52 Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984) ("[T]he limited grant [of copyright] is a means by which an important public purpose may be achieved.").
53 *Id.* ("[Copyright protection] is intended to motivate the creative activity of authors and inventors by the provision of a special reward . . . .").
54 *See, e.g.*, Rebecca Jennings, *On TikTok Who Owns a Viral Dance?*, VOX (Feb. 4, 2020, 8:20 AM), https://www.vox.com/the-goods/2020/2/4/21112444/renegade-tiktok-song-dance [https://perma.cc/2SNY-TH9U].
55 *Id.*
56 *See id.*
57 *Id.*
58 Moore & Haasch, *supra* note 27.
59 *List of Most-Followed TikTok Accounts*, *supra* note 15.
60 Shepard, *supra* note 9.
61 Allie Nelson, *No Dunkin' on Her Coins! Charlie D'Amelio's Net Worth in 2023—And How Much She Made on 'Dancing with the Stars',* PARADE (May 22, 2023), https://parade.com/celebrities/charli-damelio-net-worth [https://perma.cc/XLR4-M832]; Taylor Lorenz, *The Original Renegade*, N.Y. TIMES, https://www.nytimes.com/2020/02/13/style/the-original-renegade.html [https://perma.cc/FQQ4-RB8S] (last updated Aug. 28, 2021).
62 *See generally* Shepard, supra note 9; Adam Connell, *32 Latest TikTok Statistics for 2022: The Definitive List,* BLOGGINGWIZARD, https://bloggingwizard.com/tiktok-statistics/ [https://perma.cc/TG7F-995F] (last updated Jan. 1, 2024).

are between twenty and twenty-nine.[63] However, a viewer's ability to "simply watch" videos without creating content, or even signing up for the app, has a likely appeal for older generations as well.[64] Further, according to a 2021 statistic, the amount of time spent on TikTok has increased each year since its creation by over 210% and has been projected to continue this growth.[65] The same article also stated that TikTok users were expected to grow to 88.7 million by 2024.[66]

II. THE HISTORY OF COPYRIGHTING CHOREOGRAPHY

The word choreography derives from the Greek words for "dance" and "write," as much of 16th and 17th century choreography consisted of recorded movement on paper.[67] However, despite the long-time recognition of choreography as art, it wasn't until the enactment of the Copyright Act of 1976 that the United States extended copyright protection to standalone "choreographic works."[68] Section 102 of the Act grants protections for "'pantomimes and choreographic works' created after January 1, 1978, and fixed in some tangible medium of expression."[69]

The U.S. Copyright Office describes choreography as the "composition and arrangement of a related series of dance movements and patterns organized into a coherent whole."[70] But it also opines that "commonplace movements or gestures" or compilations of "social dances" may not be protectable choreography.[71] Congress has never given a specific definition for what makes a choreographic work protectable.[72] Rather, at the ratification of the Act, it proposed the meaning of choreography to be "fairly settled."[73] The U.S. Copyright Office has also listed elements which are often found in a copyrightable choreographic work, in order to assist in clearing confusion surrounding the Act.[74] The elements include:

63 Shepard, supra note 9.
64 See Jim Tobin, *What is TikTok's Shelf Life, Considering Vine Withered and Died?*, FORBES (Feb. 10, 2020, 6:00 AM), https://www.forbes.com/sites/forbesagencycouncil/2020/02/10/what-is-tiktoks-shelf-life-considering-vine-withered-and-died/?sh=1be6137c4a86 [https://perma.cc/NT6U-V8VM].
65 Connell, *supra* note 62.
66 *Id.*
67 *Choreography*, BRITANNICA, https://www.britannica.com/art/choreography [https://perma.cc/9DEP-RKBQ] (last visited Feb. 3, 2023).
68 Sye, *supra* note 34.
69 *Copyright Registration of Choreography and Pantomime*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/circs/circ52.pdf [https://perma.cc/MEJ2-GVGN] (last visited Sept. 8, 2022).
70 *Id*.
71 *Id*.
72 *See id*.
73 Edwina M. Watkins, *May I Have This Dance: Establishing Liability Standard for Infringement of Choreographic Works*, 10 J. INTELL. PROP. L. 437, 440 (2003).
74 *See* U.S. COPYRIGHT OFFICE, *supra* note 69.

Rhythmic movements of one or more dancers' bodies in a defined sequence and a defined spatial environment, such as a stage; A series of dance movements or patterns organized into an integrated, coherent, and expressive compositional whole; A story, theme, or abstract composition conveyed through movement; A presentation before an audience; A performance by skilled individuals; and Musical or textual accompaniment.[75]

Dances must not meet all the requirements, and the presence or absence of one factor is not sufficient to determine a choreographic work's copyrightability, but the culmination of factors can give clues to the dance's possible protection under the Act.[76] However, despite the recognition of these factors in 1976, artists, lawyers, and judges have continued to debate the copyrightability of many choreographic or movement-based works.[77] This uncertainty has formed the basis for the most famous choreographic copyright case to date[78] and shaped the way these artists share their work with the world.

The major choreographic decision to settle some of this uncertainty came about in 1986 with the appellate decision in *Horgan v. Macmillan, Inc.*[79] Esteemed choreographer George Balanchine sought "to enjoin the publication of a book entitled 'The Nutcracker: A Story & a Ballet'" which featured photographs of Balanchine's choreography from the New York City Ballet's production of The Nutcracker.[80] While the district court found that photographs could not constitute an infringement of a copyrighted, chorographical work, the Second Circuit disagreed, ultimately rejecting the idea that choreography was the flow of steps, unreproducible in still photographs.[81] This decision helped to form an understanding of choreography which now expands past traditional notions of fixation and across mediums.[82]

A. *The Differences Between Traditional Choreography and Viral Dance*

It is important to draw distinctions between more traditional forms of dance and TikTok choreography, so that the shortcomings of copyright protection for viral dance can be properly understood. Choreography is a well-respected art form that has been practiced for hundreds of years.[83]

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75 *Id.* at 2.
76 *Id.*
77 *See* Julie Van Camp, *Copyright of Choreographic Works*, 1994–95 ENT., PUBL'G & ARTS HANDBOOK (1994), https://home.csulb.edu/~jvancamp/copyrigh.html [https://perma.cc/THV3-JCQK].
78 *See* Sye, *supra* note 34; Horgan v. Macmillan, Inc., 789 F.2d 157, 157 (2d Cir. 1986).
79 Sye, *supra* note 34.
80 *Horgan*, 789 F.2d at 158.
81 *Id.*
82 *See id.* at 158.
83 *See Choreography*, *supra* note 67.

Viral dance, though an art, differs from this tradition in several ways: viral dance is social dance, it requires audience participation, and it is disseminated rapidly.[84]

There are types of art which exist outside of the space of copyright protection and thrive in this unprotected sphere.[85] In many senses, viral dance operates more closely to the world of fashion than the world of dance; its trendiness is at the center of its essence.[86] Like viral dance, fashion trends move quickly, are intended to be widely disseminated, and are only cool until they reach peak popularity and quickly fade out of style.[87] In the world of fashion, designers are aware of the difficulties that come with protecting their work, especially in the United States where designers are awarded even less copyright protection than some other countries, namely European ones.[88] Many believe that the freedom of fashion to evolve without the constraints of copyright law is what allows the industry to thrive.[89] It has been largely accepted that requiring licenses or prohibiting the reproduction of most fashion design would result in endless litigation and halt progress for designers at all levels.[90] Similarly, viral choreography would likely be negatively impacted by the inability for dances to be copied and adapted freely.[91]

However, unlike viral choreography, fashion designers may be protected by another category of intellectual property law: trademark.[92] Trademark is used by fashion industry professionals to protect brand names, logos, slogans and other source-identifying materials.[93]

84 *See* discussion *infra* Part II.A.3; *see* discussion *infra* Part II.A.2; Lauren Strapagiel, *These Are The Most Viral Dances On TikTok For 2020 So Far*, BUZZFEED NEWS (Oct. 26, 2022, 9:30 AM) https://www.buzzfeednews.com/article/laurenstrapagiel/most-viral-tiktok-dances-of-2020 [https://perma.cc/PH2S-VCQL].

85 *See, e.g.*, Mike Masnick, *A Look at How the Fashion Industry Thrives Without* Copyright, TECHDIRT (May 26, 2010, 11:12 AM) https://www.techdirt.com/2010/05/26/a-look-at-how-the-fashion-industry-thrives-without-copyright/ [https://perma.cc/D33E-2LNV].

86 *See* Serena Elavia, How the Lack of Copyright Protections for Fashion Designs Affects Innovation in the Fashion Industry (Apr. 10, 2014) (B.A. thesis, Trinity College) (on file with the Trinity College Digital Repository).

87 *See id*. ("The fashion industry's low-IP environment is constitutive of this induced obsolescence /anchoring dynamic: designer's frequent referencing of each other's work helps to create (and then exhaust) the dominance themes, and these themes together constitute a mode that consumers reference to guide their assessments of what is 'in fashion.'") (quoting Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1732 (2006)).

88 *Fashion Design Protection: US vs. EU*, IP WISELY (June 28, 2018), https://ipwisely.com/fashion-design-protection-us-vs-eu/ [https://perma.cc/N42S-ATW7] (explaining the differences between copyright and IP protection in the U.S. and in Europe).

89 *See, e.g.*, Mike Masnick, *A Look at How the Fashion Industry Thrives Without Copyright*, TECHDIRT (May 26, 2010, 11:12 AM), https://www.techdirt.com/2010/05/26/a-look-at-how-the-fashion-industry-thrives-without-copyright/ [https://perma.cc/D33E-2LNV].

90 *See* Elavia, *supra* note 86, at 27–28 (explaining that "copyright protections could increase litigation activity.").

91 *See* discussion *infra* Part II.D.2.

92 *See* Dayoung Chung, *Law, Brands, and Innovation: How Trademark Law Helps to Create Fashion Innovation*, 17 MARSHALL REV. INTELL. PROP. L. 492, 496 (2018).

93 *See id.*

Unfortunately, choreography itself does not qualify for trademark protection, creators may be able to protect the name of their dance by registering with the United States Patent and Trademark Office.[94] This is unlikely to be a protection available for TikTok creators, however, who typically name their dances after the song to which the dance is performed so that it can be easily recognized and searched for online and in the app.[95]

1. The Speed of Viral Dance

Coincidentally, TikTok has further contributed to the trendy nature of the fashion industry; the app has been deemed largely responsible for the popularity of "microtrends."[96] Microtrends occur when an item or style rises to popularity quickly and fades out just as fast.[97] Where, in the past, the traditional trend cycle lasted about 20 years, microtrends occur over months or even weeks.[98] This is just one example of how quickly TikTok popularity can come and go[99]; the same speed can be found in viral dance trends.[100] For instance, in October 26, 2020, Buzzfeed News put out an article detailing eleven dances that had swept the app earlier that year alone; 2020 averaged about one viral dance per month.[101]

Further, videos on TikTok are accessible on mobile devices across the world.[102] While it may be true that you are more likely to receive content from your own country, videos by foreign users can be accessed and may be recommended based on TikTok's algorithm, which seeks to show individuals personalized content.[103] This world-wide connectivity allows speedy access to trending videos, including trending choreography from across the globe, with the simple search of a hashtag.[104] The protection of traditional copyright, which generally extends to the life of the author plus seventy years and is enforceable only in the United States is

94 *See Can You Trademark a Dance?* WANG IP L. GRP., P.C. (Feb. 13, 2019), https://www.thewangiplaw.com/blog/2019/02/can-you-trademark-a-dance/[https://perma.cc/SMD7-5GFX].
95 *See* Georgina Smith, *Best TikTok Dances, Top 20 ft. WAP, Renegade, Dance with your Hands, and More*, DEXERTO (Sep. 4, 2023, 8:02 AM), https://www.dexerto.com/entertainment/best-tiktok-dances-1550828/ [https://perma.cc/MA4T-UL2L].
96 Grace Huber, *Microtrends and TikTok's Effect on Fashion*, DROPS OF INK (Sept. 23, 2022), https://www.lhsdoi.com/24920/features/microtrends-and-tiktoks-affect-on-fashion/ [https://perma.cc/D6UZ-SLBR].
97 *Id.*
98 *Id.*
99 *See id.*
100 *See* Lauren Strapagiel, *These Are The Most Viral Dances On TikTok For 2020 So Far*, BUZZFEED NEWS (Oct. 26, 2022, 9:30 AM) https://www.buzzfeednews.com/article/laurenstrapagiel/most-viral-tiktok-dances-of-2020 [https://perma.cc/PH2S-VCQL].
101 *See id.*
102 *See* Shepherd, *supra* note 9.
103 *See* Cristina Newberry, *How the TikTok Algorithm Works (And How to Work With It in 2023)*, HOOTSUITE (Feb. 11, 2022), https://blog.hootsuite.com/tiktok-algorithm/ [https://perma.cc/RT58-26HC].
104 *See #differentcountriesdances*, TIKTOK, https://www.tiktok.com/discover/different-countries-dances [https://perma.cc/X453-2UCB] (last visited Jan. 2, 2023).

wasted on world-wide dance that will become nearly obsolete in a season.[105]

2. The Audience as Active Participant in Viral Dance

Further, unlike more traditional choreographic works, TikTok users act as both audience and participant to a viral dance video. Users have the option to like, comment, share, duet, stitch, repost, and more when interacting with videos on the app.[106] The way that audiences interact with an original poster's video can help determine a creator's "engagement."[107] The engagement rate is a signifier of how compelling an audience member thinks a creator's content is.[108]

However, perhaps even more important than traditional interaction, which only boosts an original video's engagement, the very nature of viral dance depends on the audience's physical embodiment of the trend, that is, their own recreation of the trending choreography.[109] During a professional ballet or Broadway performance, members of the audience are not encouraged to "join in" the choreography, or further yet, to recreate the choreography for recordation and later publication. However, TikTok choreography depends on its ability to be shared, copied and reperformed by non-creators; it is not intended to be solely a spectator sport.[110]

3. The Social Aspects of Viral Dance

It should also be considered that viral dance takes on many of the "social dance" characteristics that the Copyright Act authors did not intend to protect.[111] The United States Copyright Office has previously determined that protectable choreography cannot be "commonplace movements or gestures" or compilations of "social dances."[112] However, many of TikTok's most popular viral dances are choreographed as a short series of moves that are already well known to the TikTok community.[113] For

105 *How Long Does Copyright Protection Last?*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/help/faq/faq-duration.html [https://perma.cc/B8KU-NFZZ] (last visited Jan. 28, 2024).
106 Barbara Krasnoff, *How to Understand TikTok's Homescreen Icon*, VERGE (Oct. 11, 2022, 10:29 AM), https://www.theverge.com/23362769/tiktok-home-screen-icon-how-to [https://perma.cc/FQK6-3QPN].
107 *See Influencer Engagement Rate Calculator*, GRIN, https://grin.co/influencer-marketing-tools/engagement-rate-calculator/ [https://perma.cc/JNG9-AQ8F] (last visited Jan. 2, 2023).
108 *Id.*
109 Wstadmin, *How TikTok has Influenced Different Dancing Styles*, WORLD CHAMPION PRODS. (Dec. 5, 2022), https://www.worldchampionproductions.com/2022/12/05/how-tiktok-has-influenced-different-dancing-styles [https://perma.cc/8J6F-NFL2].
110 *See id* ("TikTok has changed the dance world is through its accessibility. Anyone can create and share a dance video on the platform with a smartphone and internet connection. This has allowed a wider range of dancers to be seen and recognized, rather than just those with the resources to attend formal dance training or audition for professional opportunities.").
111 *See* U.S. COPYRIGHT OFFICE, *supra* note 69.
112 *Id.*
113 *See, e.g.*, Tait, *supra* note 3.

instance, the previously discussed "Renegade" is only a 15-20 second long dance containing 21 steps and no footwork.[114] The dance includes well-known trends like "the Woah," and choreographer Harmon has even called the dance "a medley of already popular moves."[115] Further, the widespread participation in dances like the "Renegade" could arguably fit a court's perception of the meaning of "social."[116] The U.S. Copyright Office defines "uncopyrightable social dances [as] generally intended to be performed by members of the public for the enjoyment of the dancers themselves," whereas copyrightable dances "are typically intended to be executed by skilled performers before an audience."[117] The office explains that even dances which "contain a substantial amount of creative expression" cannot be copyrightable if they qualify as "simple routines."[118]

Additionally, TikTok dances are popularized through wide-spread, rapid dissemination, which helps videos remain both popular and trendy.[119] The very word "viral" is used to describe videos which "spread[] quickly and widely on the internet through social media."[120] Under the current Copyright Act, the typical protection of a copyright extends to life of the author plus seventy years.[121] The length of copyright protection is completely unnecessary for viral dances, which are usually only popular for a few months before being replaced.[122] This unnecessary protection may point further to the idea that these dances were never intended to fit under the protection of copyright. In fact, with only rudimentary understanding of the history of chorographical copyright, it seems rather apparent that viral dance does not fit the definition of copyrightable choreography at all, and that creators like Keara Wilson may have inappropriately received registration.

B. *How Identity Shapes the Effects of Copyright Protection*

It is also important to discuss the way that copyright has traditionally impacted artists of varying identities, and how these disparities would likely continue if viral dance is more commonly copyrighted. Scholars have recently begun to note the racial disparities that have

114 *Id.*
115 *Id.*
116 *See generally*, U.S. COPYRIGHT OFFICE, *supra* note 69.
117 *Id*.
118 *Id.*
119 *See How Many Views is Viral? The Answers to Your Questions*, LEVITATE, https://levitatemedia.com/learn/viral-video-views [https://perma.cc/J8PA-VKFU] (last visited Jan. 28, 2024).
120 *Go Viral*, COLLINS, https://www.collinsdictionary.com/us/dictionary/english/go-viral [https://perma.cc/TU4P-LH8Y] (last visited Nov. 6, 2022).
121 U.S. COPYRIGHT OFFICE, *supra* note 105.
122 *See* Strapagiel, *supra* note 100.

existed for minority authors since copyright's inception.[123] Law Professor Elizabeth Rosenblatt writes about copyright's "one-way racial appropriation ratchet," which describes the unfair phenomenon that minorities endure at the hands of copyright law.[124] Rosenblatt writes that "dominant cultures appropriate from minorities with impunity, but when minorities appropriate from dominant culture, they find legal challenge and moral condemnation."[125] In the article *Copyright, Culture, and Black Music: A Legacy of Unequal Protection*, author K.J. Greene discusses the racist history of copyright, and how Black creators have been systematically deprived of copyright protection since its inception.[126] Greene argues that "Blacks as a class received less protection for artistic musical works due to (1) inequalities of bargaining power (2) the clash between the structural elements of copyright law and the oral predicate of Black culture, and (3) broad and pervasive social discrimination . . . ."[127] For example, when litigation ensues over true ownership of a TikTok dance, "already-famous TikTokers can often steal the limelight from lesser-known dancers . . . [which] has been particularly troubling for black creators . . . who have frequently seen white TikTokers get credit for their routines."[128]

Further, individuals with less access to education can also be negatively impacted by the requirements of copyright.[129] Copyright also "disadvantages those who lack the financial resources to create 'from scratch' but can rely on technologies that allow them to transform preexisting material into new works. And it disadvantages those who want to use the works of dominant culture to 'talk back' to inequality."[130] Additionally, wealthy individuals generally have better access to talented legal teams and corresponding advantages in subsequent lawsuits.[131] Therefore, the protection of copyright typically benefits creators with the most access and wealth, while works that are not granted protection are deemed less valuable in the eyes of society.[132]

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123 *See* Elizabeth L. Rosenblatt, *Copyrights One-Way Racial Appropriation Ratchet,* 53 U.C. DAVIS L. REV. 591 (2019) (exploring what Rosenblatt describes as the *"gradual shifting and consolidation of copyright ownership away from racial minorities and toward those who appropriate from those minorities.")*; K.J. Greene, *Copyright, Culture, and Black Music: A Legacy of Unequal Protection*, 21 HASTINGS ENT. AND COMMC'N L.J. 339 (1998) (recording the systematic deprivation of copyright protection from African American musical artists).

124 Rosenblatt, *supra* note 123, at 594.

125 *Id.*

126 Greene, *supra* note 123, at 340.

127 *Id.* at 356 (footnotes omitted).

128 Tait, *supra* note 3.

129 Greene, *supra* note 123, at 355–56.

130 Rosenblatt, *supra* note 123, at 605.

131 *Why Do the Rich Get Away with Their Crimes?*, DELAUGHTER BAIL BONDS, https://delaughterbailbonds.com/blog/why-do-the-rich-get-away-with-their-crimes/ [https://perma.cc/W9KC-Y5TQ] (last visited Jan. 2, 2023).

132 Rosenblatt, *supra* note 123, at 601.

C. *The Issues of Copyrighting TikTok Choreography*

In the last twenty years, the internet and social media apps like TikTok have only exacerbated previous concerns about how choreographers can effectively protect their dance work.[133] However, viral dance also holds its own unique set of issues when it comes to copyrightability. When a dance is posted online, it becomes "fixed," and therefore achieves copyrightability.[134] However, this automatic copyrightability does not preclude creators from problems.[135] Copyrighting viral dance comes with a series of challenges which can be divided into three categories: availability, enforceability, and desirability.

1. The Issue of Availability

Due to a lack of common knowledge about copyright requirements, many content creators may not understand the rights awarded to them through the process of registration.[136] The applicable copyright statute for works created after January 1, 1978 (i.e., all TikTok dance choreography) grants rights to the authors of these works.[137] Among these are the right to distribute the work, the right to prepare derivative works based off of the original, and the right to reproduce the work itself.[138] The statute also lays out an additional right for literary, dramatic, musical, and choreographic works: the right to display the work publicly.[139]

However, enforcing these rights takes money, time, and resources that many viral choreographers may not have access to.[140] Copyright claims are litigated in federal court, which can lead to higher costs per case than state court cases.[141] Additionally, state courts provide certain

133 *See* Jill Vasbinder, *Laying Claim to Dance isn't as Straightforward for TikTok Creators*, QUARTZ (July 26, 2021), https://qz.com/2038061/common-law-copyright-is-not-enough-to-protect-tiktok-creators [https://perma.cc/LG6R-37K4]. Vasbinder believes TikTok is the current "battleground" for a centuries old problem of stolen choreography. She notes that Jalaiah Harmon is one of a "long list" of recent creators of color dealing with this problem. *Id.*

134 *Id*.

135 *Id.*

136 *See generally* Deborah Wythe, *Copyright is Complicated*, BROOKLYN MUSEUM, (Jan. 13, 2010) https://www.brooklynmuseum.org/community/blogosphere/2010/01/13/copyright-is-complicated/ [https://perma.cc/V3GC-7KSL] (discussing the Brooklyn Museum's efforts to make the complexities of copyright law more accessible to artists).

137 *Copyright Law of the United States*, U.S. COPYRIGHT OFF., https://www.copyright.gov/title17/title17.pdf [https://perma.cc/TH7V-XY2E] (last visited Dec. 17, 2023); 17 U.S.C. § 301(a). The 1976 act was enacted on January 1, 1978 per this statute. TikTok dance could not have been created before 1978 because the app did not exist.

138 17 U.S.C. § 106.

139 *Id.*

140 *See* Steve Vondran, *How Much Does it Cost to Litigate a Copyright Case?*, VONDRAN LEGAL (July 23, 2020), https://www.vondranlegal.com/how-much-does-it-cost-to-litigate-a-copyright-case [https://perma.cc/H6DD-FWPF].

141 28 U.S.C. § 1338(a) (granting federal courts the power of original jurisdiction for all copyright claims); *see Federal Court Versus State Court: What is the Difference?*, COX PADMORE SKOLNIK & SHAKARCHY LLP, https://www.cpsslaw.com/about/articles/federal-versus-state-court-what-is-the-difference/ [https://perma.cc/P7U6-GXJZ] (last visited Nov. 6, 2022).

opportunities to speed up the litigation process, while federal courts are not allowed to streamline their cases.[142] The average copyright infringement case takes months or even years to render a verdict.[143] "Typically, a party can expect to spend several thousand dollars per month in court costs [while litigating] copyright infringement claims."[144] Therefore, individuals attempting to bring a copyright infringement claim for their choreography would have to possess a large amount of expendable money in order to enforce their protection in court.[145] This would likely prevent numerous TikTok creators from enforcing the rights to their choreography, especially those without large followings that have made little money from their contributions. Finally, even for those who can afford to bring the infringement claim, the damages may not be large enough to outweigh the cost of litigation.[146]

2. The Issue of Desirability

Even if the issues of enforceability could be eradicated, the issues of copyright's desirability surely precludes it as the preferred protection for viral dance. Copyright is undesirable for both content creators and public viewers.[147] Copyright is an exclusionary right; it allows owners to exclude infringers from copying, distributing, displaying, and performing their work.[148] However, the very nature of a TikTok dance is one that asks to be copied and performed by non-owners.[149]

A registered copyright prevents other individuals from copying or "reproducing" an author's work under threat of legal penalty.[150] For a choreographer to achieve "viral status," their choreography will need to be reproduced by a minimum of thousands of individuals in a short period of time.[151] Therefore, copyright protection is contrary to the very

142 *Federal Court Versus State Court: What is the Difference?*, *supra* note 141.
143 Keli Johnson Swan, *The True Cost of Defending Against Copyright Infringement Litigation*, SCOTT TECH. ATT'YS (Dec. 2, 2020), https://scottandscottllp.com/the-true-cost-of-defending-against-copyright-infringement-litigation/ [https://perma.cc/269E-982A].
144 *Id.*
145 *See* Vondran, *supra* note 140 ("[C]opyright lawsuits can lasts [sic] months to years and can cost from $5,000 (if a quick settlement can be reached) or on up to $100,000 or more for lengthy litigation.").
146 *See* Richard Stim, *Copyright Infringement: How are Damage Amounts Determined?*, NOLO https://www.nolo.com/legal-encyclopedia/copyright-infringement-how-damages-determined.html [https://perma.cc/6X8A-BZA9] (discussing how statutory damages, which do not require proving exact amounts of actual damages suffered can range "from $750 to $30,000 per infringement. The exact amount depends on the seriousness of the infringing act and the financial worth of the infringer.") (last visited Sept. 27, 2023).
147 *See infra*, Part II.D.2.
148 17 U.S.C. § 106.
149 *See* Wstadmin, *supra* note 109; *infra* Part II.A.2.
150 *See generally* 17 U.S.C. § 106.
151 *See How Many Views is Viral? The Answers to Your Questions*, *supra* note 6 (noting that videos are deemed viral based on the number of views they receive and the amount of time it takes to receive those views).

aspirations of TikTok choreography. If a creator chooses to register a copyright for their dance, they may open their availability to sue, but they may also destroy their opportunity to be recognized for their talents.[152] Viral choreography copyright forces creators to choose between enforcing their intellectual property rights and freely sharing their work with the world.[153]

For TikTok dancers, if the long-lasting, exclusionary protection of copyright is awarded more liberally to the trending choreography of the app, it could mean ensuring that any choreography they find online is not copyrighted before posting their version of the moves, lest they be sued for infringement. Average users may likely not understand the bars of reproduction that copyright registration creates and violate works without an understanding of the legal and financial consequences that could result.[154] Others may participate in the trends regardless of possible consequences because they assume their video will not reach a widely recognized status, only to later be sued when their video performs unexpectedly well on the app.

Consumers of TikTok dances would also be affected by extensive protection from copyright infringement. More restrictions for creators likely means less content, or at least less quality content.[155] After the Black creator protest of 2021, non-participating TikTok choreographers attempted their own versions of Megan Thee Stallion's "Thot Shit."[156] Writer for the *Hollywood Reporter*, J. Clara Chan, wrote that despite Meg's song being "a near perfect blueprint" for a viral TikTok dance, inexperienced creators presented "plenty of questionable dance moves (hand waving and hand holding, to name a few) that failed to consider the directions in 'Thot Shit' for listeners to put their hands on their knees and twerk . . . ."[157] Chan called these dances "a far cry from the complex moves seen in other viral dances like the Renegade, created by Jalaiah Harmon . . . ."[158] While choreographers can always post their dances to their own pages, requiring influencers and app users to seek approval from these copyright owners before reproducing the dances could mean they would risk receiving far less attention.

152 Ali Johnson, Comment, *Copyrighting TikTok Dances: Choreography in the Internet Age*, 96 WASH. L. REV. 1225, 1261 (2021) (discussing that"[a]lthough copyright law is a highly effective method of safeguarding intellectual property rights, the threat of enforcement could result in a chilling effect on the widespread dissemination of a choreographer's routine.").
153 *Id.*
154 *See generally* Wythe, *supra* note 136 (discussing the Brooklyn Museum's efforts to make the complexities of copyright law more accessible to artists).
155 *See* Chan, *supra* note 32.
156 *Id.*
157 *Id.*
158 *Id.*

3. The Issue of Enforceability

It is true that choreographers could choose to enforce their copyright protection against certain individuals (like famous influencers), while ignoring reproductions by others.[159] For example, many creators may be angered that their dance was performed without their consent on a prominent night show (likely resulting in money for the influencer's performance), but they may encourage average, unpopular users to attempt their dance challenge for in-app purposes.[160] Therefore, creators could choose to enforce their copyright only against individuals who make money or gain a large amount of social standing from their work.[161] However, while this choice enforcement may help to ensure proper credit, it does not solve the problem of compensation. Creators make money from the number of users recreating their dance; stopping influencers from using their choreography is ineffective for this purpose.[162]

These issues only enumerate some of the concerns that arise for creators attempting to protect their viral dances. To better understand how copyright protection is intended to operate and why viral dance stands outside of these intentions, it is necessary to briefly explore the history of choreographic copyright in the United States.

III. INEFFECTIVE SOLUTIONS FOR VIRAL DANCE PROTECTION

To determine how to wholly and most appropriately safeguard TikTok choreographers, all possible forms of protection should be considered, and their advantages and disadvantages should be considered relative to each other.

A. Addressing Issues of Traditional Copyright

In Part I and II of this Note, the ways that viral dance is differentiated from traditional choreography were explained in full detail.[163] However, it is true that copyright is the current solution that creators like Keara Wilson have chosen to ensure their artistry is recognized.[164] Further, current progress seeks to alleviate some of the issues associated with

159 *Enforcement of Copyrights Through Lawsuits & Criminal Charges*, JUSTIA, https://www.justia.com/intellectual-property/copyright/enforcement/ [https://perma.cc/Z364-Z23E] (last visited Oct. 15, 2023) (stating that "[i]f somebody infringes your copyright, you are entitled to file a lawsuit in federal court to enforce your rights.").
160 Yasharoff, *supra* note 32.
161 *See Enforcement of Copyrights Through Lawsuits & Criminal Charges*, *supra* note 159 (individuals have discretion as to whether or not to bring a claim against an infringer).
162 *See* Tait, *supra* note 3 ("[A] successful TikTok account can bring in money from brands who pay influencers to post sponsored content and adverts on their profiles.").
163 *See supra* Parts I and II.
164 Paige Skinner, *The TikToker Who Created the Viral Dance "Savage" is Copyrighting the Moves*, BUZZFEED, https://www.buzzfeednews.com/article/paigeskinner/savage-dance-copyrighted [https://perma.cc/B67D-H7AL] (last updated Aug. 2, 2021).

traditional copyright for viral dance protection.[165] For instance, certain concerns about disproportionate impacts on creators of color have been combated by creators like JaQuel Knight, the go-to choreographer for Beyoncé.[166] Knight is currently pioneering his own company to represent diverse choreographers across the country.[167] He opines that "[c]opyrighting movement is about putting the power back in the artist's hands,"[168] and believes that his company, Knight Choreography & Music Publishing, Inc., will help to award equal resources and platforms to future generations of artists.[169] "Knight explained that the point of copyrighting dances isn't to prevent people from dancing at home or at parties, but rather [to] protect choreographers from having their works exploited by major companies for profit, [like] what happened with Fortnite."[170] Knight's company is "the first of its kind" and the possible outcomes of his corporation remain unknown.[171] Regardless, Knight's company can have only a finite effect, and without legal representation and superstar-worthy resources, enforcing a copyright may remain inaccessible for most individuals.[172]

Another concern of copyright protection is the expense that copyright litigation incurs, and the resources that it takes to endure these lengthy trials.[173] However, the newly-created Copyright Claims Board serves to provide an alternative to expensive copyright infringement litigation.[174] Instead of a lengthy trial in court, the Claims Board consists of a three-member tribunal which helps to resolve small claims up to $30,000.[175] Therefore, the Claims Board could likely serve as an alternative for creators without the time and money to endure federal litigation.[176] Even so, large scale violations could not be presented to the Claims Board.[177] Further, even if this kind of copyright protection could

165 *See e.g., id*; Jazz Tangcay, *Beyonce and Megan Thee Stallion Choreographer JaQuel Knight Launches Company to Copyright Dance Moves*, VARIETY (Apr. 22, 2021, 9:05 AM), https://variety.com/2021/artisans/news/beyonce-choreographer-jaquel-knight-copyright-dance-moves-1234957578/ [https://perma.cc/4HC3-RQG7] (noting that one choreographer has begun a partnership which helps to protect choreography made by creators of color by giving them legal and financial resources to copyright their work).
166 Skinner, *supra* note 164; Tangcay, *supra* note 165.
167 Skinner, *supra* note 164; Tangcay, *supra* note 165.
168 Tangcay, *supra* note 165.
169 *Id.*
170 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/oif/literally-stealing-the-show-a-brief-and-recent-history-of-dance-copyright/ [https://perma.cc/BG2T-NRVM].
171 *Id.*
172 *See supra* Part II.D.3 (discussing the issues many individuals encounter when enforcing their copyright).
173 *See* Vondran, *supra* note 140.
174 *The Copyright Claims Board (CCB)*, COPYRIGHT CLAIMS BD., https://ccb.gov [https://perma.cc/Z5SC-VXJN] (last visited Nov. 5, 2022).
175 *Id.*
176 *Id.*
177 *Id.*

be used to protect TikTok choreography, a small claims board may help alleviate issues of accessibility and enforceability for protection, but would not eliminate all previously expressed concerns about the desirability of copyright for viral dance protection.[178]

The issue of enforceability could possibly be addressed by copyright's Fair Use Doctrine, which allows copyrighted work to be used for certain purposes without permission from a copyright owner, but could prohibit reproduction for commercial gain by non-owners.[179] It is true that in certain situations, a copyrighted work can legally be used by individuals other than the copyright holder.[180] One of these exceptions is the doctrine of Fair Use, codified in Section 107 of the Copyright Act.[181] Fair use allows a protected work, for example, a copyrightable registered work, to be used by others without the permission of the copyright owner.[182] However, fair use in choreography has historically been reserved for nonprofit cultural and educational institutions.[183] The goal of fair use is to allow the public access to copyrighted work for "educational, cultural, and civic needs."[184] However, because TikTok profits off of engagement with viral dances, and because there is little traditional educational value in these dances, they would likely not qualify for copying under the Fair Use doctrine and would not be benefited by its listed statutory purpose.[185] Further, the Fair Use Doctrine does not address any of the previously listed concerns about the copyrightability of viral dances, and if material is not copyrightable, it is not protected by Fair Use.[186]

Regardless of whether or not the posting of a viral dance constitutes Fair Use, a choreographer has the ability to license the dance for use by non-owners.[187] Licensing of a copyright allows a party to transfer or assign its rights, or portions of its rights, to a third party for a limited and specified use.[188] Music is commonly licensed.[189] For example, when an artist records an album, they will often license the album to their record

178 *See supra* Part II.D.2 (discussing why copyright is not a desirable form of protection for viral dance because it does not allow others to recreate dances without permission).
179 *See* HARV. UNIV., OFF. GEN. COUNS., COPYRIGHT AND FAIR USE: A GUIDE FOR THE HARVARD COMMUNITY 8 (2016), https://ogc.harvard.edu/files/ogc/files/ogc_copyright_and_fair_use_guide_5-31-16.pdf [https://perma.cc/ZXZ8-4A8J].
180 *Id.*
181 *Id.*
182 *Id.*
183 Elizabeth F. Jackson, *Copyright and Choreography: The Good, The Bad, and The Fair*, DANCE/USA (July 10, 2012), https://www.danceusa.org/ejournal/2012/07/10/copyright-and-choreography-the-good-the-bad-and-the-fair [https://perma.cc/EB6E-VDTW].
184 *Id.*
185 *Id.*
186 HARV. UNIV., OFF. GEN. COUNS., *supra* note 179.
187 *See What is Copyright Licensing?*, COPYRIGHT ALL., https://copyrightalliance.org/faqs/what-is-copyright-licensing [https://perma.cc/WAB3-ZFLZ] (last visited Jan. 2, 2022).
188 *Id.*
189 *Id.*

company in exchange for royalties.[190] TikTok already operates within its own licensing scheme.[191] By using the app, users agree to TikTok's Terms of Service, which includes TikTok's ability to license any user-uploaded content to third parties, so long as the use of the copyrighted material is for "private, non-commercial purposes" or for "generating User Content."[192] However, though this broad license is typical of social media sites, its enforcement has not yet been "seriously tested" and its strength in federal courts is unclear.[193] Further, it is also unknown how this kind of licensing would affect apps offending content outside of the United States.[194]

Licenses like that of the Creative Commons allow the use of a work during the copyrighted period while maintaining some rights for the copyright holder.[195] However, all Creative Commons licenses require the user to credit the copyright owner.[196] Similarly, private licensing is not a feasible solution. It requires expertise, time, and money that many creators and viewers do not have access to and which cannot be executed widely or quickly enough as is necessary for trending videos.[197] Further, when "choreographers require[] others to license their works, innovation c[an] stall."[198] Imagine a world where a TikTok viewer needs to apply for a license before recording a dance that they see on their feed; assuming that the average user could even understand their legal duty to obtain a proper license, the result would likely be a much smaller number of videos being produced. In turn, this would likely mean that a choreographer's dance would reach fewer people and that licensing could ultimately stunt a choreographer's virality.[199]

B. *Addressing TikTok's Internal Changes*

It seems that some of the concerns users and creators have expressed over content contribution have not fallen on deaf ears. TikTok has

190 *Id.*
191 Johnson, *supra* note 152, at 1236.
192 *Id.* at 1236–37*; see What is User-Generated Content? The Ultimate Guide to UGC Marketing*, NOSTO (Jan. 27, 2021), https://www.nosto.com/blog/what-is-user-generated-content/ [https://perma.cc/XZZ5-WEGL] (noting that "user-generated content is any form of content—text, posts, images, videos, reviews, etc.—created by individual people (not brands) and published to an online or social network.").
193 Johnson, *supra* note 152, at 1237–38.
194 *Id*. (noting that "[s]cholarly work has questioned whether these contracts… would be enforceable in the United States and abroad, given basic principles of contract interpretation.").
195 *Id.* at 1255.
196 *Id.*
197 *See generally* Rich Stim, *The Basics of Getting Permission*, STAN. LIBRS., https://fairuse.stanford.edu/overview/introduction/getting-permission/ [https://perma.cc/9D58-N5TC] (last visited Jan. 2, 2023).
198 Jessica Goudreault, *Copyrighting the Quotidian: An Analysis of Copyright Law for Postmodern Choreographers*, 39 CARDOZO L. REV. 751, 783 (2017).
199 *See* Vasbinder, *supra* note 133.

attempted to make several changes and additions to its platform to help incentivize creativity on its platform. For instance, on March 25, 2021, TikTok introduced a creator fund to the app.[200] The fund set aside $200 million for United States creators "to celebrate and support the best and brightest talent" on TikTok's platform.[201] After what TikTok opines to be an "incredible response" to the fund's implementation, it is expected to grow to over one billion dollars in the United States by 2024.[202]

However, the fund has been met with resistance by many outspoken TikTokers:

Many creators were surprised that they earned only a few dollars a day, even if their videos racked up tens of thousands or even hundreds of thousands of views. Furthermore, some creators found that the number of views they received on videos dropped noticeably after joining the program—so much so that several creators chose to leave the program, as they felt the small payout was not worth the dip in viewership.[203]

Further, the fund is not accessible to all TikTok users. The creator fund has technical criteria that users must meet to qualify.[204] United States fund receivers "must be 18 years or older, be a legal resident of one of the 50 states, District of Columbia, or the territories and possessions, of the United States, meet a minimum following threshold of 10K authentic followers, have accrued at least 100K authentic video views in the last 30 days, and post original videos in line with . . . [TikTok] Community Guidelines."[205] This would eliminate the possibility for many creators to receive funds.[206] Young choreographers, choreographers outside of the United States, or choreographers without a large social following will likely receive no monetary compensation from this fund, even if they manage to receive credit for their moves.[207]

TikTok has also attempted to make it easier for creators to stake a claim in their own original creations. Since TikTok does not post videos chronologically and instead arranges videos through user-algorithms, it can be difficult to determine when a post was made, and therefore, who made a post first.[208] In a content-creation dispute, timestamps could be

200 Vanessa Pappas, *Introducing the $200M TikTok Creator Fund*, TIKTOK, https://newsroom.tiktok.com/en-us/introducing-the-200-million-tiktok-creator-fund [https://perma.cc/N3F7-NJXD] (Mar. 25, 2021).
201 *TikTok Creator Fund: Your Questions Answered*, TIKTOK, https://newsroom.tiktok.com/en-gb/tiktok-creator-fund-your-questions-answered [https://perma.cc/PY5K-KDBD] (last updated Mar. 25, 2021).
202 Pappas, *supra* note 200.
203 Johnson, *supra* note 152, at 1273 (citations omitted).
204 *Creator Fund*, TIKTOK, https://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/creator-fund/ [https://perma.cc/G3D4-MSVU] (last visited Oct. 14, 2022).
205 *Id.*
206 *See generally id.*
207 *See id.*
208 Ryan Benson, *Tinkering With TikTok Timestamps*, DFIR.BLOG (Aug. 11, 2020), https://dfir.blog

used to help solve ownership discrepancies by showing which creator posted a viral dance first.[209] In October 2019, TikTok began adding timestamps to all of their videos, which meant that the date the video was uploaded was displayed to all users.[210] However, only three months later, the stamps disappeared with no explanation from TikTok.[211] But, as of December 2023, TikTok has been timestamping videos on the "Following" page (where users see content from creators they have elected to follow) and on videos displayed from a creator's personal profile, but not the "For You" page (where users experience new, curated videos based on personal algorithms).[212]

This kind of technological date recordation falls under the concept of digital "fingerprinting."[213] Fingerprinting describes methods of internet tracking where data is collected from a device's software.[214] Websites like TikTok use this sort of technology to prevent bot attacks and to stop fraud and identity theft, but also to generate personalized content and advertisements.[215] Fingerprinting has a high accuracy rate, and can reliably identify a device out of extremely large groups.[216] While fingerprinting could provide important information about the creation of certain trends through timestamps, this type of identification could cause concern for internet users, who may seek specialized programs and device settings to help prevent their computers from releasing their private information.[217]

Furthermore, even if TikTok's own timestamp implementation could ensure rights to creators on their own app, TikTok's inability to control other video streaming apps means that viral choreographers' dance trends are not fully protected. For instance, "Instagram Reels" – which allows Instagram users to watch video content selected by algorithm – often show TikTok videos taken from their original context and without links to the video's owner.[218] Further, screen recordings of

/tinkering-with-tiktok-timestamps/ [https://perma.cc/WYJ2-V2MQ].

209 Liz Sommer, *TikTok Removes Timestamp Feature*, STAYHIPP (Jan. 6, 2020), https://stayhipp.com/news/tiktok-removes-timestamp-feature/ [https://perma.cc/NZ4V-YP9W]. ("The temporary timestamp feature may have provided clues as to how trends spread and what is popular at which times…").

210 *Id.*

211 *See id.*

212 *See* TIKTOK, https://www.tiktok.com [https://perma.cc/4DEG-B8PZ] (last visited Dec. 17, 2023).

213 *See* Paul Cawthon, *Browser Fingerprinting: A Complete Guide,* INCOGNITON, https://incogniton.com/browser-fingerprinting-complete-guide/ [https://perma.cc/8HEF-GKXU] (last visited Jan. 2, 2023).

214 *Id.*

215 *Id.*

216 Nica Latto, *What is Browser Fingerprinting and How Can You Prevent it?*, AVAST (Oct. 22, 2020), https://www.avast.com/c-what-is-browser-fingerprinting [https://perma.cc/JN6A-DRM7].

217 *Id.*

218 *See* Nat Rubio-Licht*, Instagram, Fed Up with People Sharing TikToks to Reels, is Changing its Algorithm*, PROTOCOL (Apr. 20, 2022), https://www.protocol.com/instagram-algorithm-reels-tiktok [https://perma.cc/X8P4-VKFM].

TikToks that are uploaded to YouTube and other video sites may pose difficulties for creators seeking to have their hard work recognized.[219]

It is also unclear whether TikTok has the proper motivation to implement more changes of their own to protect against copyright infringement. Under the Digital Millennium Copyright Act Safe Harbors provision of Section 512 of the Copyright Act, TikTok and other online providers are shielded from liability for infringing copyrighted material so long as they comply with certain "notice-and-takedown" procedures.[220] A notice and takedown occurs when a rightsholder alerts an online service provider that their material has been infringed and identifies the specific infringing material.[221] After a provider receives notice of the infringing activity, they must act quickly to take down or disable it.[222] However, even though the law seems to protect from copyright infringement, it has often been used to shield large companies from liability for the infringing content on their websites.[223] For instance, the federal court deemed that in certain cases, media platforms are not responsible for the infringing content on their sites.[224] "According to the court, a service provider must have actual knowledge or be willfully blind of 'the specific locations of infringements' to lose the DMCA 'safe harbor' from copyright infringement liability."[225] This high standard means that apps like TikTok are only required to stop copyright infringement which has been located and named, and that they are otherwise safe from such liability.[226] In the context of viral dance, this would require choreographers to find and name any infringements of their work, which would not only be time consuming and difficult, but also may be contrary to the intention of the creators, who are likely attempting to have their videos performed by other users.

IV. A POSSIBLE SOLUTION: STATUTORY REQUIREMENTS FOR PROTECTING TIKTOK CHOREOGRAPHERS

Because licensing and traditional avenues of copyright contain an abundance of issues for viral choreographers, it is necessary to look to

219 *See Scammers Use YouTube Shorts for Posting Stolen Videos from TikTok: Report*, ECON. TIMES, https://economictimes.indiatimes.com/tech/technology/scammer-use-youtube-shorts-for-posting-stolen-videos-from-tiktok-report/articleshow/88879577.cms [https://perma.cc/EK4W-NVUN] (last updated Jan. 13, 2022, 6:19 PM).

220 *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System,* U.S. COPYRIGHT OFFICE, https://www.copyright.gov/512/ [https://perma.cc/G452-ED42] (last visited Jan. 2, 2023).

221 *Id.*

222 *Id.*

223 *See, e.g.*, *YouTube Stays Safe Under DMCA "Safe Harbor"*, CDAS (May 1, 2013), https://cdas.com/youtube-stays-safe-under-dmca-safe-harbor-2/ [https://perma.cc/VR7M-W5JU].

224 *See id.*

225 *Id*.

226 *See id.*

other possible ways that these creators can receive credit and compensation for their work.[227] If viral dance does not fall under the protection of copyright, how can the public ensure that choreographers and content-makers are encouraged to continue creating? One large-scale solution is policy change to hold internet providers accountable to their user-contributors, ensuring that they are compensated and credited for their contributions to the platform.

Countries across the world have already begun to focus on regulating apps and internet service providers through law.[228] However, copyright has often remained the laws' bases when the laws concern accreditation to creatives.[229] In the European Union, a 2019 law was enacted to ensure that service providers across the web were held responsible for not properly licensing users' copyrighted material.[230] Article 13 of the European Union Copyright Directive requires online service providers to use "best efforts" to obtain licenses to any copyrighted works within user-generated content.[231] Where a license cannot be obtained, the site should attempt to remove the infringing content.[232] The presumption of infringement can be rebutted if the provider can show that "it made 'best efforts' to get permission from the copyright holder[;] it made 'best efforts' to ensure that material specified by rights holders was not made available[; and] it acted quickly to remove any infringing material of which it was made aware."[233] While some individuals saw the law as a "step forward" for "ordinary" people who will no longer be liable for uploading copyrighted material to large service providers, others saw Article 13 as a "massive blow" to the internet which would create a "more closed society."[234] In reality, the law caused very few changes to the internet at all, and only two years after the implementation of Article 13, the European Court of Justice found that providers would not be liable for infringement unless they had "specific knowledge" of the infringement and failed to "expeditiously delet[e]" the material.[235]

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227 *See* discussion *supra* Parts I.B and III.A.

Article I.228 *See* Greenburg Traurig LLP, *Increased Global Regulatory Focus on Mobile Apps: What Companies Should Know*, LEXOLOGY (Apr. 11, 2023), https://www.lexology.com/library/detail.aspx?g=88b50bc1-0f8f-4e4f-870e-f58f62643082 [https://perma.cc/Z4KA-2AVF] (noting that various worldwide data protection authorities have recently "indicated their intention to increase privacy enforcement efforts against mobile apps.").

229 *See* Chris Fox, *What is Article 13? The EU's Copyright Directive Explained*, BBC NEWS (Feb. 14, 2019), https://www.bbc.com/news/technology-47239600 [https://perma.cc/LWN8-L5JM].

230 *Id*.

231 *Id.*

232 *Id.*

233 *Id.*

234 Zoe Kleinman, *Article 13: Memes Exempt As EU Backs Controversial Copyright Law*, BBC NEWS (Mar. 26, 2019), https://www.bbc.com/news/technology-47708144 [https://perma.cc/2TYD-C7FY].

235 Ryan Browne, *YouTube Secures a Big Win in the EU Over Copyright*, CNBC (June 22, 2021, 7:12 AM), https://www.cnbc.com/2021/06/22/youtube-secures-a-big-win-in-the-

Any proposed statutory regulations would need to include requirements for exactly how apps and websites should fairly compensate their users for platform contributions. For instance, these laws should likely include guidelines on rates and methods of compensation that creators are entitled to be based on their social or financial contributions to the app. Further, the laws may require internal changes to the TikTok app that help to protect creators. It could also include a mandatory system like YouTube's Content ID program which "allows rights-holders to register copyrighted content with YouTube so that user-uploaded material can be scanned against" the registered material.[236] This program then blocks any infringing material from being viewed.[237] While this specific program requires copyrightability, similar programs could be created for non-copyrightable content by, for instance, stamping videos with hashtags or user profiles that properly attribute any video choreography. Mandatory avenues of registration for TikTok choreographers to claim their dance could be one way to ensure that creators receive credit for all interactions and recreations of their dances, all without having to meet the requirements that copyright protection entails.

A. The Difficulties of Statutory Reform for the Protection of Viral Choreography

Unfortunately, statutory reform will not be a simple or immediate solution to the problem of unprotected TikTok choreography. Rather, statutory reform should be the ultimate goal of lawmakers and politicians seeking to ensure that creatives have incentive to continue creating in a world of technological advancement and new social values.

If laws are drafted to keep service providers accountable to their contributors, it is likely that these drafts will be met with large resistance, especially from the apps these rules seek to regulate. When the European Union introduced its Article 13 proposal, the bill was met with large resistance from apps like YouTube, who released frightening statements about the law making it "too risky" to allow users from the EU to upload videos to their platform at all.[238] TikTok would likely be underwhelmed at the prospect of losing profits to pay their user-contributors.

Since lawmakers and politicians will write and pass these bills, they will also need to have a clear understanding of this issue and its importance in the larger scheme of internet usage and artistic progression.

eu-over-copyright.html [https://perma.cc/VMV7-3P5D].

236 Robert Bateman, *Complying With Article 17 of the EU Copyright Directive*, TERMSFEED, https://www.termsfeed.com/blog/eu-copyright-directive-article-17/ [https://perma.cc/VY76-79NL] (last updated July 1, 2023).

237 *How Content ID Works*, YOUTUBE HELP, https://support.google.com/youtube/answer/2797370?hl=en-GB [https://perma.cc/2QL3-DURN] (last visited Jan. 2, 2023).

238 *See* Fox, *supra* note 229.

At this time, it is unclear whether members of Congress will be willing or able to understand the complexities and necessity of this kind of technological reform. Further, assuming they do, it is unclear whether their policymaking will move quickly enough to keep up with trending advancements. However, the Supreme Court has also agreed that Congress is the proper being to make important distinctions about copyrightability in an advancing world.[239] In the landmark copyright case of *Sony Corporation of America v. Universal City Studios*, the court opined "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by . . . new technology."[240]

It is also a concern that even if some lawmakers undertake the task of parsing through the large issues of user-contribution, the proposed reforms may be unpassable at the congressional level, where the bill would likely need bipartisan support. Other pushes to control social media have caused strife between parties, splitting support for reform by "blue" or "red."[241] In 2021, out of more than one hundred bills which aimed to regulate social media's control over their users' posts, only three prevailed.[242] Further, since they were passed, courts have blocked two of them from taking effect.[243] However, until these bills are written and introduced, it is impossible to understand their political implications and constitutionality.

Finally, any law that the United States passes for enforcement of provisions by apps like TikTok will only affect the app domestically.[244] Other countries would not be bound by United States law.[245] However, United States laws may encourage others to follow suit and take a more active stance in defending their own creators from apps.[246]

239 *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 431 (1984).
240 *Id.*
241 Rebecca Kern, *Push to Rein in Social Media Sweeps the* States, POLITICO (July 1, 2022, 4:30 AM), https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229 [https://perma.cc/CNW3-DCQ2] (discussing how democrats want to censor harmful hate speech, while conservatives often fight against censorship, which they believe violates their First Amendment right).
242 *Id.*
243 *Id.*
244 *See generally* Akhilesh Pillalamarri & Cody Stanley, *Online Content Regulation: An International Comparison,* GEO. WASH. UNIV. L. SCH. (Dec. 8, 2021), https://studentbriefs.law.gwu.edu/ilpb/2021/12/08/online-content-regulation-an-international-comparison/ [https://perma.cc/N9QP-GU3A] (detailing the differences between the U.S.' general approach to content regulation as opposed to other various jurisdiction like China, India, the EU, and the UK).
245 *See id*. (noting that many countries have traditionally implemented an intermediate level of internet liability called "conditional liability," which falls between the strictest and "most permissive" standards of China and the U.S., respectively).
246 *See e.g.*, *id*. (discussing India's content regulation laws and noting that "India's freedom of speech tradition was inspired by both British and American norms.").

Despite the hurdles that must be overcome to pass effective statutory regulations, the benefits to choreographers and TikTok users alike will be worth the strife to help promote artistic progress as the framers intended.

CONCLUSION

Viral dance is not a passing trend. It is a large-scale industry which, in a few short years, has already sparked both controversy and litigation in the world of media and entertainment law. Its creators deserve recognition and payment for their contributions to the world of dance. However, the traditional protection of copyright is inaccessible, unenforceable, and undesirable for both content creators and audience participants.[247] Even if a TikTok choreographer has access to properly copyrighting their work, they will also need the resources to enforce their rights. If these rights are properly enforced, the dance in question will likely have little chance at becoming viral because it will be impossible to copy, and creators will receive less recognition and compensation than they may have without the copyright at all. Further, licensing schemes and avenues for small copyright claims cannot fully indemnify the other concerns of copyright protection, even if they provide small relief.[248] Therefore, it is necessary to look to other means of protection outside of the more traditional, accepted recourse of copyright for violations surrounding artistic works.

While TikTok has made its own feeble attempts to satiate growing unrest over these issues on its platform, their extra-legal solutions have been largely ineffective.[249] Instead of relying on for-profit apps to regulate their own media, it is imperative that the United States introduce a series of statutory schemes that require content distributors like TikTok to ensure their contributors are receiving proper credit and monetary compensation for their work.[250]

While it will likely be difficult to gain the bi-partisan support needed to implement such laws, particularly in the face of expected backlash from apps like TikTok, statutory regimes will be the most effective way to ensure that apps like TikTok give credit where it's due.[251] Failure to properly attribute such works will result in unnecessary litigation and difficult line-drawing exercises for courts around the country. The United States' influence could also result in statutory changes across the world, as other countries decide that viral content creation is a valuable form of art. These changes will ultimately lead to a more informed, less exploited

247 *See supra* Part II.D.
248 *See supra* Part III.A.1.
249 *See supra* Part III.A.2.
250 *See supra* Part IV.A.
251 *See supra* Part IV.A.1.

internet population, which will assuredly benefit creatives across the globe for technologically advancing centuries to come.

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