BRING IT ON IN REAL LIFE: INTELLECTUAL PROPERTY LAW STILL FAILS TO PROTECT MINORITY CREATORS

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I. INTRODUCTION

Have you watched a TikTok[1] dance lately? Or any other viral dance video? In an era of social media where short video clips of dances thrive and go viral, you may be surprised to know that usually these dances are not protectable intellectual property. Such lack of protection has led to subsequent creators stealing dance moves without giving proper credit. This practice is similar to the plot of the film *Bring It On,* in which a cheerleading squad discovers that its past captain stole all of the team's cheer routines from an inner-city school.[2] Generally, choreography, as a subset of dance, is protected as intellectual property under copyright law, but not all dance is copyrightable. There is little protection for the ordinary choreographer of dances on social media, and there is no protection for choreographers' dances that are considered "social dances" or consist of only a few steps. Historically, people of color have predominantly not had access to and have not been protected by the copyright system, resulting in situations where White people frequently profit off stolen works created by people of color.

This paper will argue that there should be more protection for choreographers of social dances and creators of choreography generally to ensure more equitable access to copyright protection. The rest of this article will proceed as follows: In part one, I discuss the background of intellectual property law and choreography as a copyrightable subject matter, including the evolution of copyrightable choreography from ballet to the recent addition of hip hop and the historical theft of minority creators' works. In part two, I discuss the relevant recent unsuccessful cases related to dance moves and social dances under intellectual property law, which show that the intellectual

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[1] TikTok is a video-sharing app that lets users create and share short videos on any topic. Werner Geyser, *What is TikTok? – The Fastest Growing Social Media App Uncovered,* INFLUENCER MARKETING HUB, (June 11, 2021) https://influencermarketinghub.com/what-is-tiktok/ (last visited Apr. 11, 2021).

[2] BRING IT ON (Universal Pictures 2000).

property system still does not protect smaller creators from big businesses. In part three, I discuss the current protections available for social dances, my argument for increasing such protections of these dances, and the probable effect of including social dances as copyrightable subject matter.

II. BACKGROUND

This section will look at the history of intellectual property and copyright law specifically, including Congress's relatively recent decision to include choreography as a copyrightable work. It will also examine the racially fraught history of intellectual property law in this country.

A. History of Dance as Intellectual Property

The first federal copyright protection began in 1790 by the first Congress.[3] The United States Constitution contains a Copyright Clause,[4] which authorizes Congress to enact legislation surrounding copyrighting.[5] The Framers of the Constitution intended copyright to be "the engine of free expression."[6] The economic philosophy behind the Copyright Clause was that the encouragement of individual effort by personal gain is the best way to advance the welfare of the public through the arts and sciences.[7] Copyright law generally is intended "to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world."[8] More recently, the Copyright Clause has been interpreted by the U.S. Supreme Court to mean that the intellectual property system should incentivize the creation and dissemination of ideas.[9]

For any work to be copyrightable, it must be original and fixed in a tangible medium of expression.[10] An original work must possess some minimal degree of creativity, meaning that the work must at least be more creative than a phone book.[11] Fixing a work in a tangible medium of

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[3] 1 Nimmer on Copyright § A.01 (2020) (first citing Act of May 31, 1790, ch. 15, 1 Stat. 124; and then David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U. CHI. L. REV. 775, 825–28 (1994)).

[4] U.S. CONST. art. I, § 8, cl. 8.

[5] 1 Nimmer on Copyright § A.01 (2020) *supra* note 3.

[6] Harper & Row, Publrs. v. Nation Enters., 471 U.S. 539, 558 (1985).

[7] Mazer v. Stein, 347 U.S. 201, 219 (1954).

[8] Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 36 (1939).

[9] Golan v. Holder, 565 U.S. 302, 325-26 (2012).

[10] 17 U.S.C. § 102.

[11] Feist Publ'ns, Inc. v. Rural Tel. Servs. Co., 499 U.S. 340, 364 (1991).

expression could include writing the idea down, recording a performance on video, or creating a drawing. Once a copyrightable work is fixed in a tangible medium, the copyright in the work exists.[12] Registering the work with the U.S. Copyright Office is only necessary for the owner of the copyright to be able to sue another to enforce the owner's exclusive rights to use the copyrighted material.[13]

Choreographic works were first recognized as a copyrightable category in 1976.[14] A work created prior to January 1, 1978, may be copyrightable as a "dramatic work," meaning that the work "tell[s] a story, develop[s] a character, or express[es] a theme or emotion by means of specific dance movements and physical actions."[15] This "dramatic work" category left out most choreography outside of traditional ballet.[16] Choreographic works were originally not granted copyright protection under their own category because (1) Congress did not find dance worthy of copyright protection and not beneficial to society, (2) choreography needed to tell a story, be part of a dramatic work, or convey the proper moral tone, and (3) Congress did not know how to define abstract choreography.[17] The decision by Congress to recognize choreography as copyrightable subject matter was due to advocacy efforts by choreographers, the rise of choreography in popular culture, and Congress's recognition of the importance of dance as an art form.[18]

Even after copyright protection was extended to choreography as its own category, Congress intended to protect only "expressive works of authorship, such as ballet or modern dance," and "did not intend to protect all forms of dance or movement."[19] The U.S. Copyright Office still has a preference for ballet today, stating in its Compendium of U.S. Copyright Office Practices that "as a general rule, classical ballet and modern abstract dance are

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[12] *Copyright Basics,* U.S. COPYRIGHT OFFICE, Circ. 1, at 4, https://www.copyright.gov/circs/circ01.pdf.

[13] *Id.*

[14] U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 102.2(a) (3d ed. 2021) (hereinafter COMPENDIUM (THIRD)).

[15] COMPENDIUM (THIRD) *supra* note 14, at § 2122.3; 17 U.S.C. § 102(a)(4).

[16] Yola Robert, *JaQuel Knight Is Paving The Way For The Future Of Copyrighting Dance,* FORBES (Nov. 23, 2020, 1:33 PM), https://www.forbes.com/sites/yolarobert1/2020/11/23/jaquel-knight-is-paving-the-way-for-the-future-of-copyrighting-dance/?sh=59e240cfe72e.

[17] Kathleen Abitabile & Jeanette Picerno, *Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 CAMPBELL L. REV. 39, 42-43 (2004).

[18] Katie M. Benton, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 82 (2008).

[19] COMPENDIUM (THIRD) *supra* note 14, at § 805.5(B).

considered choreographic works, because they objectively constitute an expressive compositional whole."[20]

Of the eight categories of works that are copyrightable,[21] "pantomimes and choreographic works" are one of the three that are not defined by Congress.[22] The reasoning given by Congress behind not defining "choreographic work" is that it has a "fairly settled meaning" and it is not necessary "to specify that 'choreographic works' do not include social dance steps and simple routines."[23] However, the U.S. Copyright Office has defined what constitutes a choreographic work.[24] For the U.S. Copyright Office, choreography is defined as "the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole."[25] Dance is defined differently, as the "static and kinetic succession of bodily movement in certain rhythmic and spatial relationships and in relation to time and space."[26] Choreography is not the same as dance; instead, it is a subset of dance.[27] The U.S. Copyright Office states that a choreographic work typically contains one or more of the following elements:

> 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.[28]

For a choreographed work to be registered with the U.S. Copyright Office, it must be fixed in a tangible medium with sufficient detail to permit the work to be performed in a consistent and uniform manner.[29] Some acceptable formats of the recordation of the work in a tangible medium include dance notation, such as Labanotation[30] and Benesh Dance Notation; video recordings of a performance; and textual descriptions, photographs, or

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[20] COMPENDIUM (THIRD) *supra* note 14, at § 805.7.

[21] *Id.*

[22] *Id.*

[23] H. R. REP. NO. 94-1476, at 53-54 (1976).

[24] U.S. COPYRIGHT OFFICE, *Glossary* to COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, at 3 (3d ed. 2021).

[25] *Id.*

[26] *Id.*

[27] COMPENDIUM (THIRD) *supra* note 14, at § 805.1.

[28] COMPENDIUM (THIRD) *supra* note 14, at § 805.2(A-F).

[29] COMPENDIUM (THIRD) *supra* note 14, at § 805.3(A-B).

[30] *See generally* Robert, *supra* note 16 (showing a page of the Labanotation score for "Single Ladies").

drawings.[31] Labanotation is a method of capturing movement on a page.[32] The Benesh Dance Notation system is a method for recording human movement, similar to music notation.[33]

Some choreography is explicitly listed by the U.S. Copyright Office as not protectable via a copyright. These non-protectable works include commonplace movements or gestures, social dances, ordinary motor activities, athletic movements, and routines not performed by humans.[34] Commonplace movements or gestures include yoga positions, the grapevine, spelling out letters with your arms, and a celebratory end zone dance.[35] Social dances include ballroom dances, square dances, or any other dance intended to be performed by members of the general public rather than skilled professionals.[36] Ordinary motor activities include skateboarding tricks, feats of physical skill, and a tennis swing.[37] The U.S. Copyright Office says that it cannot register short dance routines consisting of only a few steps with minor linear or spatial variations, even if the routine is novel or distinctive.[38]

Individual dance steps and short dance routines like the grapevine or the second position in ballet are not copyrightable because they are the "building blocks of choreographic expression, and allowing copyright protection for these elements would impede rather than foster creative expression."[39] However, compilations of those activities may be copyrightable if the arrangement of movements results in an "expressive compositional whole."[40] Compilations that are not considered an "expressive compositional whole," and are thus not protectable, include a series of aerobic activities, a yoga sequence, and dance movements intended for use in a fitness class.[41] The U.S. Copyright Office describes copyrightable choreography and uncopyrightable

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[31] COMPENDIUM (THIRD) *supra* note 14, at § 805.3(D)(1-3).

[32] *Labanotation Basics*, DANCE NOTATION BUREAU, http://dancenotation.org/lnbasics/frame0.html (last visited Apr. 27, 2021).

[33] *Benesh International: Benesh Movement Notation*, ROYAL ACADEMY OF DANCE, https://www.royalacademyofdance.org/benesh-international-benesh-movement-notation/ (last visited Apr. 27, 2021).

[34] COMPENDIUM (THIRD) *supra* note 14, at § 805.4(C), 805.5(B)(2-3).

[35] *Copyright Registration of Choreography & Pantomime,* 52 U.S. COPYRIGHT OFFICE, at 3, https://www.copyright.gov/circs/circ52.pdf.

[36] COMPENDIUM (THIRD) *supra* note 14, at § 805.5(B)(2).

[37] *Copyright Registration of Choreography and Pantomime,* U.S. COPYRIGHT OFFICE, Circ. 52, at 3, https://www.copyright.gov/circs/circ52.pdf (last visited Apr. 27, 2021).

[38] COMPENDIUM (THIRD) *supra* note 14, at § 805.5(A).

[39] Brantley v. Epic Games, Inc., 463 F. Supp. 3d 616, 622 (D. Md. 2020) (citing Horgan v. Macmillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986)).

[40] COMPENDIUM (THIRD) *supra* note 14, at § 805.7.

[41] U.S. COPYRIGHT OFFICE, *supra* note 37, at 4.

dance as being on a continuum, with ballet, modern dances, "and other complex works" at one end, and social dances, simple routines, and other uncopyrightable movements at the other end.[42]

Derivative works are also protected under copyright.[43] A derivative work is a work derived from a preexisting work.[44] If one were to create a new television show based on the original characters in *Friends*, then the new show would be a derivative work, and therefore one would not be able to copyright the characters, but only the new story that one created.[45] The copyright in a compilation or derivative work is only for the material contributed by the author of the new work, meaning that a new author cannot claim copyright protection for material in the original work that the new work was derived from.[46] The creator of a derivative work infringes on the protected portion of the original unless the creator of the derivative work obtains a license from the owner of the underlying copyright.[47]

While choreography is copyrightable now, copyrights in choreography are not typically registered. Of the over 500,000 applications received by the U.S. Copyright Office each year, the number of applications for choreographic works is typically less than 20.[48]

B. Dance, Race, and Culture

While copyright law has existed for decades, not all people were allowed to participate in the system of intellectual property and copyright registration at its inception.[49] There has, unfortunately, been a long history in the United States of theft of intellectual property from Black creators and the exclusion of Black creators from the registration system.[50]

Cultural appropriation has been consistent throughout the United States' history, resulting in the dominant culture stereotyping and demeaning

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[42] COMPENDIUM (THIRD) *supra* note 14, at § 805.5(B).

[43] 17 U.S.C. §103.

[44] 17 U.S.C. §101.

[45] *See generally* Anderson v. Stallone, No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109 (C.D. Cal. Apr. 25, 1989).

[46] 17 U.S.C. §103.

[47] Sissom v. Snow, 626 F. App'x 163, 166 (7th Cir. 2015).

[48] Robert, *supra* note 16.

[49] *See generally* K.J. Greene, *Copyright, Culture and Black Music*, 21 HASTINGS COMM. & ENT. L.J. 339, 388 (1999) ("Black artists as a class have not received "equal protection" of intellectual property rights in part due to social and economic inequality and social discrimination.").

[50] K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT LJ 1179 (2008).

minority cultures.[51] In the nineteenth century, White audiences found African slave music and dance to be a nuisance,[52] but those same White audiences sought African Americans who could teach them popular dances.[53] The minstrel shows of the nineteenth and twentieth centuries further exemplify the cultural appropriation that is so prevalent in the United States' history. Those minstrel shows were based on "the appropriation of Black creativity" and featured Whites onstage "masquerading in blackface as Blacks."[54] Some have said that those minstrel shows, in their imitation of African Americans, were "a tribute to the black man's music and dance in that the leading figures of the entertainment world spent the better part of the nineteenth century imitating his style."[55]

In the music industry, cultural appropriation "waters down the vitality of Black music to make it more palatable for White audiences"[56] and erases the culture that was appropriated.[57] Throughout the United States' history, White artists appropriated not only other cultures, but also entire songs without acknowledgement, attribution or authorization.[58] For example, Elvis Presley appropriated Big Mama Thornton's song "Hound Dog," which she had recorded three years before him.[59] Further, Elvis Presley "*frequently* covered songs recorded by black artists for struggling independent labels."[60] Led

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[51] *Id.* at 1203 (quoting K.J. Greene, *Copyright, Culture and Black Music*, 21 HASTINGS COMM. & ENT. L.J. 339, 358, 373 (1999)).

[52] *Id.* at 1187 (citing Alfred L. Brophy, *Integrating Spaces: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319, 333 (2005) (discussing nuisance lawsuits filed by White property owners in proximity to Black churches)).

[53] *Id.* (citing Joseph E. Holloway, *Africanisms in American Culture* 326 (2d ed. 2005) ("[T]he 'Charleston,' a dance with origins in Africa, 'became so popular that a premium was even placed on hiring of black domestics that could dance it well enough to teach the [white] lady of the house.'")).

[54] *Id.* at 1191 (citing FRANCIS DAVIS, THE HISTORY OF THE BLUES: THE ROOTS, THE MUSIC, THE PEOPLE FROM CHARLEY PATTON TO ROBERT CRAY 37 (1995)).

[55] *Id.* (citing MARTHA BAYLES, HOLE IN OUR SOUL: THE LOSS OF BEAUTY AND MEANING IN AMERICAN POPULAR CULTURE 27 (1994)).

[56] Greene, *supra* note 49, at 373.

[57] Greene, *supra* note 50, at 1203 (citing ARNOLD WHITE, THE RESISTANCE: BEYOND BORDERS 546-8 (2001).

[58] Keith Aoki, *Distributive Justice and Intellectual Property: Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development),* 40 U.C. DAVIS L. REV. 717, 762 (2007).

[59] Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C.L. REV. 547, 617 (citing Arnold Shaw, *Researching Rhythm & Blues*, 1 BLACK MUSIC RES. J. 71, 72 (1980)).

[60] *Id.* (emphasis added) (citing Bruce Tucker, *"Tell Tchaikovsky the News": Postmodernism, Popular Culture, and the Emergence of Rock "N' Roll*, 9 BLACK

Zeppelin's song "Whole Lotta Love" (1969) copied "You Need Love," written by Willie Dixon.[61]

Still today, the United States' current system of intellectual property registration encourages the intellectual theft of Hip-Hop artists' material by continuing to exclude dance moves as copyrightable material.[62] While Western European choreography has historically been protected, African dance styles have continued to lack protection.[63] The West African tradition of introducing children to dance through having them repeat dance moves of their family members until the moves were mastered was transplanted to the American South through slavery.[64] In his article arguing for copyright protection for dance moves, Elijah Hack posits that the repeatability of African-American and hip-hop dance, in contrast to the complexity of ballet choreographies, helps explain why Western European choreography is protected and African dance moves lack protection.[65] Traditional, full-length hip hop choreography, unlike the shorter dances seen on TikTok, do not lack any of the complexity of traditional ballet.[66] The lack of copyright protection for social dances in comparison to traditional ballet likely stems from the traditional requirement that the choreography convey a story, as seen in the early copyrightability of dance only as a dramatic work; the lack of appreciation for non-Western art forms; and the traditional exclusion of Black creators from intellectual property protection.

The *Martha Graham* case, discussed below, involves the copyrighting of ballet choreography and illustrates just how readily courts recognize the copyrightability of ballet. The example of the recent successful copyright

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MUSIC RES. J. 271, 282 (1989)).

[61] Aoki, *supra* note 58.

[62] Elijah Hack, *Milly Rocking Through Copyright Law: Why the Law Should Expand to Recognize Dance Moves as a Protected Category*, 88 U. CIN. L. REV. 637, 650 (2020).

[63] *Id.* at 650.

[64] *Id.* (citing Danielle Jacobowitz, Danielle Jacobowitz, *The Commodification and Appropriation of African-American Vernacular Dances* (2016) (Ph.D. dissertation, University of Washington), https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/36569/Jacobowitz_washington_0250O_15807.pdf?sequence=1.

[65] *Id.*

[66] *Compare* Prix de Lausanne, *Precious Adams - 2014 Prize Winner - Finals - Classical Variation*, YOUTUBE (Feb. 10, 2014), https://www.youtube.com/watch?v=YT95D6leFNI, *with* Julian Deguzman, *Sicko Mode- Travis Scott- Julian Deguzman Choreography,* YOUTUBE (Aug. 25, 2018), https://www.youtube.com/watch?v=CMil_QRuzgU, *and* ThePalaceDanceStudio, *BBHMM | ICONIC EDITION - The Royal Family Virtual Experience*, YOUTUBE (Nov. 5, 2020), https://www.youtube.com/watch?v=HdYQt0YU2XI.

registration of JaQuel Knight's choreography for "Single Ladies," discussed more fully in subsection two, demonstrates copyright law's move towards being more inclusive to other forms of dance.

1. Martha Graham School & Dance Foundation, Inc.

The *Martha Graham* case demonstrates how easily ballet can be recognized as a copyrightable work in contrast to other types of dances, which are more difficult to register for copyright protection. In *Martha Graham*, a dance foundation and estate sued a dance center and school concerning the copyright ownership of 70 dances created by Martha Graham.[67] While the ownership of the copyrights in those ballets was at issue, whether the works were copyrightable at all was not at issue.[68] Both the plaintiffs and the defendants had successfully registered copyrights in some of the ballets at issue.[69]

One ballet that was not copyrightable was *Tanagra*, which was created and published in the 1920s without copyright notice, so it had entered the public domain before this case began.[70] Material in the public domain is not protected by copyright and may be freely used.[71] In an earlier version of the case, the court explained that the U.S. Copyright office had no problem with whether the ballets were choreography or not, but the issue came down to whether the ballets had been published or not.[72] Whether the ballets had been published or not helped determine ownership of the ballets.[73] This ease of registering ballets is in stark contrast to the difficulty that choreographers of other styles of choreography have experienced in trying to register their works.

2. JaQuel Knight's Choreography

On July 9, 2020, JaQuel Knight, the choreographer of Beyoncé's "Single Ladies" music video, successfully copyrighted his "Single Ladies"

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[67] Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 374 F. Supp. 2d 355 (S.D.N.Y. 2005).

[68] *Id.*

[69] Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 224 F. Supp. 2d 567, 587 (S.D.N.Y. 2002).

[70] *Martha Graham Sch. & Dance Found., Inc.*, 374 F. Supp. 2d at 356-357.

[71] U.S. COPYRIGHT OFFICE, *Glossary* to COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, at 16 (3d ed. 2021).

[72] *Martha Graham Sch. & Dance Found., Inc.*, 224 F. Supp. 2d at 581-86.

[73] *Id.*

choreography.[74] Knight's Single Ladies choreography was one of the first pieces of non-ballet choreography to be approved for copyright.[75] JaQuel Knight has been described as "the first person to copyright dance moves."[76] Nothing in the U.S. Copyright Office's guidance indicates that it now views dance moves or social dances as copyrightable. It is more likely that the U.S. Copyright Office determined that JaQuel Knight's choreography fits under the copyrightable category of "choreography".

Knight has stated that his reasoning for copyrighting his choreography is not to protect choreographers from people doing the dances at home, but instead to protect the creator from "huge corporations that come in and take advantage."[77] Copyrighting his choreography also ensures that choreographers are "recognized and receive appropriate credit and protection."[78]

Knight has since gone on to successfully register copyrights in the choreography for the song "Body" by Megan Thee Stallion and in the choreography for the song "Already" by Beyoncé.[79] Knight has recently created his own choreography business that will function like a music publisher, in that it will broker licensing deals, protect intellectual property, and oversee the rights to Knight's dance moves.[80] The company may also be involved in filing Digital Millennium Copyright Act takedown requests with TikTok and YouTube when users upload content involving copyrighted moves.[81] Knight's victories in court and subsequent business ventures may open the door to successful copyright registrations of shorter choreographic works, like dance moves or social dances.

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[74] U.S. COPYRIGHT OFFICE, Copyright Catalog, Registration No. PA0002247718 (2020).

[75] Robert, *supra* note 16.

[76] James Hale, *"Single Ladies" Choreographer JaQuel Knight Becomes First Person to Copyright Dance Moves,* TUBEFILTER (Apr. 23, 2021) https://www.tubefilter.com/2021/04/23/single-ladies-choreographer-copyright-moves-jaquel-knight/.

[77] Ari Shapiro et al., *He Choreographed 'Single Ladies' And 'WAP.' Now He's Got A Bigger Mission*, NPR (Nov. 16, 2020, 3:47 PM), https://www.npr.org/2020/11/16/934603252/he-choreographed-single-ladies-and-wap-now-hes-got-a-bigger-mission.

[78] Robert, *supra* note 16.

[79] U.S. COPYRIGHT OFFICE, Copyright Catalog, Registration Nos. PA0002271338, PA0002266073 (2020).

[80] 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/.

[81] Hale, *supra* note 76.

II. THE EPIC GAMES CASES

Several recent cases have advanced the caselaw surrounding choreography as intellectual property and demonstrated the issues surrounding copyrighting choreography, including defining what exactly is a choreographic work. The following cases all involve the videogame developer Epic Games and choreography used in its videogame Fortnite.[82] Epic Games sells dance "emotes," which copy choreography from popular culture, for use in Fortnite.[83] The result of Epic Games profiting from this use of choreography is that many of the creators of the dances or the artists associated with the original dances have come forward to sue Epic Games for the use of their moves.

A. Ribeiro

Actor Alfonso Ribeiro sued the creators of Epic Games for its depiction of "The Carlton" in Fortnite.[84] "The Carlton" is a dance performed by Alfonso Ribeiro's character Carlton Banks on the television show *The Fresh Prince of Bel-Air*.[85] Ribeiro's suit was dismissed without prejudice because Ribeiro had not yet applied for copyright protection from the U.S. Copyright Office.[86] Once he attempted to register his copyright, the U.S. Copyright Office rejected his application because "The Carlton" did not meet the elements of a copyrightable choreographic work because it consisted of only three dance steps.[87] However, this rejection by the U.S. Copyright Office

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[82] *See* Cinema of Gaming, *Fortnite Dances in Real Life that Are 100% in Sync! (Original Fortnite Dances in Real Life)*, YOUTUBE (Dec. 21, 2019), https://www.youtube.com/watch?v=vvKTm1m-AIo (showing the original source material for Fortnite dances alongside the Fortnite dances from the videogame itself).

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

[84] Complaint at 1, Ribeiro v. Epic Games, Inc., No. 2:18-cv-10412 (C.D. Cal. Dec. 17, 2018).

[85] Andrea Park, *How Alfonso Ribeiro came up with "The Carlton Dance,"* CBS NEWS (Aug. 19, 2015, 4:00 PM), https://www.cbsnews.com/news/how-alfonso-ribeiro-came-up-with-the-carlton-dance-fresh-prince-of-bel-air/.

[86] Bill Donahue, *After Big Copyright Ruling, Dance Cases To Be Refiled*, LAW360 (Mar. 7, 2019, 10:11 PM), https://www.law360.com/articles/1136676 [https://perma.cc/8YKF-TS24].

[87] *Id.*

does not prevent Ribeiro and others from pursuing his lawsuit. The Copyright Office merely must have begun the process of taking action on a copyright application before a plaintiff can file suit;[88] the U.S. Copyright Office does not have to have granted the copyright protection.[89]

B. 2 Milly

Epic Games has also been sued by 2 Milly for use of the Milly Rock dance in Fortnite. 2 Milly is a rapper who created the Milly Rock dance, and the corresponding song "Milly Rock" in 2014.[90] The dance is sold in the Fortnite game as an emote renamed "Swipe It."[91] Similar to the case of "The Carlton," the suit was dropped because 2 Milly had to first file for copyright protection.[92] Further, similar to the Copyright Office's treatment of "The Carlton," the Copyright Office has also refused to register a copyright for the Milly Rock dance on the basis that it is more similar to a social dance intended to be performed by the general public for the public's own enjoyment than a work typically performed by a skilled dancer.[93]

C. Pellegrino

The *Pellegrino* case demonstrates how unsuccessful the alternative claims for relief for copying a dance move are when intellectual property protection for the choreographic work is not available. In *Pellegrino*, yet another person sued Epic Games (Fortnite) for using his Signature Move.[94] Pellegrino's Signature Move is "a series of movements that express his own unique dancing style" utilizing his externally rotatable feet.[95] Epic Games'

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[88] Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 891 (2019).

[89] Donahue, *supra* note 86.

[90] Eric Diep, *The "Milly Rock" Remains New York Rap Dance Royalty*, VULTURE (Sept. 18, 2020), https://www.vulture.com/article/milly-rock-explainer.html.

[91] *Rapper 2 Milly accuses Fortnite of stealing his dance moves*, CBS NEWS (Nov. 14, 2018, 1:44 PM), https://www.cbsnews.com/news/rapper-2-milly-accuses-fortnite-of-stealing-his-dance-moves-milly-rock-emote/.

[92] Donahue, *supra* note 86.

[93] Marie-Andrée Weiss, *Copyrighting a dance step? Between a Hard (Milly) Rock and a Copyright Office*, MAW LAW (Feb. 21, 2019), https://www.maw-law.com/copyright/copyright-office-refuses-to-register-milly-rock-dance/.

[94] Pellegrino v. Epic Games, Inc., 451 F. Supp. 3d 373 (E.D. Pa. 2020).

[95] *Id.* at 378.

"Phone It In" emote[96] is entirely identical to Pellegrino's Signature Move.[97] Pellegrino's claims included a violation of his right of publicity and privacy, unjust enrichment, unfair competition, false designation of origin and false endorsement, misappropriation of his trademark, and trademark dilution.[98]

When a plaintiff alleges that an expressive work violates the right of publicity and privacy, the court must look at whether the First Amendment protections afforded to the expressive work outweigh the plaintiff's publicity and privacy rights.[99] In determining whether the First Amendment protections prevail, the court looks at whether the defendant's use of plaintiff's likeness was sufficiently transformative to make the likeness at issue into the defendant's own expression.[100] The court determined that Epic Games' use of Pellegrino's likeness was sufficiently transformative to provide it with First Amendment protections.[101] The court reasoned that the use was transformative because the avatars in Fortnite performing Pellegrino's Signature Move did not share Pellegrino's identity and did not share Pellegrino's occupation.[102]

When a plaintiff makes an unjust enrichment claim, the plaintiff must state facts establishing that benefits were conferred on defendant by plaintiff, appreciation of those benefits by defendant, and acceptance and retention of those benefits under circumstances that would make it inequitable for defendant to retain the benefit without payment of value.[103] The court determined that the unjust enrichment claim failed because Pellegrino did not consent to Epic Games' use of his likeness and Pellegrino thus did not confer a benefit on Epic Games.[104]

In an unfair competition claim, the plaintiff must allege that plaintiff is in competition with the defendant, meaning that the plaintiff and defendant supply similar goods or services.[105] Pellegrino was unable to establish that he

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[96] *See generally,* Anne Friedman et al., *Fortnite, Copyright and the Legal Precedent that Could Still Mean Trouble for Epic Games*, TECHCRUNCH (Mar. 25, 2019), https://techcrunch.com/2019/03/25/fortnite-copyright-and-the-legal-precedent-that-could-still-mean-trouble-for-epic-games/ (explaining that in Fortnite, emotes are dance moves that players buy in the game for their avatars to perform).

[97] *Pellegrino*, 451 F. Supp. 3d at 378.

[98] *Id.* at 380

[99] *Id.*

[100] *Id.* (citing Hart v. Elec. Arts, Inc., 717 F.3d 141, 160 (3d Cir. 2013)).

[101] *Id.* at 381.

[102] *Id.*

[103] *Pellegrino*, 451 F. Supp. 3d at 382 (quoting Boring v. Google Inc., 362 F. App'x 273, 281 (3d Cir. 2010)).

[104] *Id.*

[105] *Id.* at 382-83.

supplied the same services or goods as Epic Games, so this claim failed.[106] To prevail on a false designation of origin claim under the Lanham Act, the plaintiff must establish that the defendant's use of the plaintiff's mark to identify its goods or services is likely to create confusion concerning the origin of the goods or services.[107] The court determined that Pellegrino's claim concerned confusion over the origin of an idea rather than the origin of goods, and thus fell under the Copyright Act, meaning that the claim could not have been brought under the Lanham Act.[108] Thus, this claim failed.

For a plaintiff to prevail on a false endorsement claim, the plaintiff must allege that "the defendant's use of plaintiff's mark to identify its goods or services is likely to create confusion concerning the plaintiff's sponsorship or approval of those goods or services."[109] The court determined that this claim could continue because there was sufficient evidence to conclude that the public associated the move with Pellegrino and Epic Games' use of the move created the false impression that Pellegrino endorsed Fortnite.[110] Pellegrino's misappropriation of trademark claim failed because it was preempted by the Copyright Act.[111] In deciding that the trademark claim was preempted by the Copyright Act, the court concluded that, because the move was alleged to be a dance, the move was "the appropriate subject matter of copyright law."[112] Pellegrino's trademark dilution claim also failed because Epic Games did not make trademark use of Pellegrino's Signature Move.[113] Ultimately, a motion to dismiss was granted on all claims except the false endorsement claim. [114]

D. Brantley

In *Brantley*, Jaylen Brantley and Jared Nickens sued Epic Games for use of their dance move "Running Man."[115] Brantley and Nickens popularized the dance in 2016, and were invited on *The Ellen DeGeneres Show* in 2018 to perform the dance.[116] Plaintiffs brought claims for invasion of the right of

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[106] *Id.* at 383.
[107] *Id.*
[108] *Id.* at 385.
[109] *Pellegrino*, 451 F. Supp. 3d at 385.
[110] *Id.* at 386-87.
[111] *Id.* at 389-90.
[112] *Id.* at 387-88.
[113] *Id.* at 391.
[114] *Id.*
[115] Brantley v. Epic Games, Inc., 463 F. Supp. 3d 616, 618-19 (D. Md. 2020).
[116] Adi Robertson, *Epic is getting sued for putting the "Running Man" dance in Fortnite*, THE VERGE (Feb. 26, 2019, 3:45 PM), https://www.theverge.com/2019/2/26/18241793/epic-fortnite-running-man-dance-

privacy and publicity, unfair competition, unjust enrichment, trademark infringement, trademark dilution, and false designation of origin.[117] There was some dispute as to whether the plaintiffs copied the dance from Instagram and had merely become associated with the dance or had created the dance entirely themselves.[118] The court did not decide whether "Running Man" would be trademarkable, but only whether it fell within the scope of copyright preemption, which is broader than the scope of copyright protection.[119] The court decided that the "Running Man" is within the subject matter of copyright law.[120] However, Epic Games' motion to dismiss was granted in its entirety because, among other reasons, Plaintiffs failed to plausibly allege a valid trademark. [121]

The Epic Games cases have shown that there are multiple procedural issues that must be taken care of first before suing for infringement, such as applying for copyright or trademark protection. When a corporation copies a smaller creator's work, as Epic Games has done, there does not seem to be much protection for the small creator. While there are other claims that can be made when a business copies a smaller creator's work that are related to copyright infringement, these claims are frequently unsuccessful, as seen in the *Pellegrino* case. For there to be equitable copyright protection, copyright law must evolve to protect smaller creators.

III. CURRENT PROTECTION AND CONSEQUENCES OF FUTURE PROTECTION FOR SOCIAL DANCES

There are two interrelated issues that arise from the current intellectual property system: how to protect choreographers of social or short dances and how to protect styles of dance other than ballet, which have historically not been protected. There has been some advancement in copyright law to protect styles of dance other than ballet, which can be seen in JaQuel Knight's successful copyright registrations. However, the choreography in short or social dances, of the type used in Fortnite and on TikTok, are not protectable via copyright registration.[122] The short, social dances on TikTok are not normally in the style of ballet but should still garner copyright protection as a style of choreography. Those dances on social media are similar to JaQuel Knight's choreography style, and copyright law should advance to protect

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copyright-lawsuit-jaylen-brantley-jared-nickens.

[117] *Brantley,* 463 F. Supp. 3d at 618-19.

[118] *Id.* at 619.

[119] *Id.* at 631.

[120] *Id.*

[121] *Id.* at 631-32.

[122] COMPENDIUM (THIRD) supra note 14, at § 805.5(B).

this emerging style of dance. This section looks at whether social dances can be adequately protected under current law and how social dances could be successfully added as copyrightable material.

A. Viability of claims under current law

Social dances on social media, fixed in the tangible medium of a video recording, have some copyright protection even today. Those short videos may be registrable as motion pictures, so the video itself could not be reproduced without infringing on the copyright.[123] However, publicly performing the social dance depicted in the short video would not be an infringement.[124]

The best claim for protection of the choreography in short, social dances that are not eligible for copyright registration, like "The Carlton," seems to be through a claim for violation of the right of publicity and privacy.[125] The right of publicity is an intellectual property right that recognizes the inherent right of every human being to control the commercial use of his or her identity.[126] For a common law right of publicity claim to succeed, the plaintiff must prove "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[127] The name or likeness element of this claim has been suggested to mean "persona," which includes any attribute, including a unique vocal style, body movement, costume, makeup or distinguishing setting, which alone or in combination can serve to identify the plaintiff.[128]

To determine whether the plaintiff's persona has been appropriated, some scholars have recommended requiring the plaintiff to "demonstrate that his image is identifiable in the defendant's use by more than a de minimis number of people."[129] Using this test, the right of publicity claim would only protect moves that have become associated with a specific person, similar to how "The Carlton" has become associated with Alfonso Ribeiro. Even if the move

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[123] COMPENDIUM (THIRD) supra note 14, at § 805.8(D).

[124] *Id.*

[125] Lauren Hutton-Work, *The Fortnite Lawsuits: A Dance Battle Royale Against Copyright Law's Protections of Choreographic Works*, 21 TEX. REV. ENT. & SPORTS L. 137, 162 (2020).

[126] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 928 (6th Cir. 2003).

[127] Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Ct. App. 1983).

[128] Chandler Martin, *Whose Dance Is It Anyway?: Carving Out Protection for Short Dances in the Fast-Paced Digital Era*, 98 N.C.L. REV. 1001, 1021-22 (2020).

[129] *Id.* at 1022.

has become part of the person's persona, as seen in the *Brantley* case,[130] this claim still may not be successful due to Copyright Act preemption.[131] The actual choreographer who created these dances would still be left without protection if the choreographer was not the person who performed the dance.

Granting copyright protection to only the person who has become associated with the work is an even greater issue today. The most recent example has been White TikTok creators copying dances created by Black TikTok creators and profiting and gaining publicity from those dances as if the dances were their own.[132] This practice reached its peak on *The Tonight Show Starring Jimmy Fallon* in March 2021 when Addison Rae (a White TikTok creator) and Jimmy Fallon performed TikTok dances, many of which were originally choreographed by people of color on TikTok.[133] This performance sparked backlash, causing Jimmy Fallon to issue an apology and invite the original creators of those dances on his show.[134] Expanding copyright protection to these shorter social dances would help protect all creators, especially people of color who suffer when White creators recreate and profit off their work.

B. Social dances deserve copyright protection

Copyright law should be expanded to reflect the evolution of choreography that has occurred in part due to social media and the use of viral media platforms promoting short clips of choreography, such as Vine and TikTok. Short social dances should be copyrightable due to the lack of protection for creators that results if they are not copyrightable and to make up for the historical lack of protection for innovative new creators.[135] Below

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[130] 463 F. Supp. 3d at 618-19.

[131] 463 F. Supp. 3d at 626-27; Donahue, *supra* note 86

[132] *See* Natasha Jokic, *Here's Why "The Tonight Show Starring Jimmy Fallon" is Facing Backlash for Its TikTok Dance Segment with Addison Rae,* BUZZFEED (Mar. 28, 2021), https://www.buzzfeed.com/natashajokic1/addison-rae-jimmy-fallon-tiktok-backlash; Tanya Chen, *Black TikTokers who Create Viral Dances are Asking the Platform's Most Popular Teens to Properly Credit Their Work*, BUZZFEED, (June 24, 2020, 5:57 PM), https://www.buzzfeednews.com/article/tanyachen/black-creators-on-tiktok-demanding-proper-dance-credits.

[133] Hannah Yasharoff, *Jimmy Fallon addresses his TikTok dance segment with Addison Rae. Here's why it sparked backlash,* USA TODAY (Mar. 30, 2021, 12:37 PM), https://www.usatoday.com/story/entertainment/tv/2021/03/30/tiktok-dances-why-addison-rae-jimmy-fallon-clip-sparked-backlash/7058920002/.

[134] *Id.*

[135] *See* Grand Upright Music, Ltd v. Warner Bros. Records Inc., 780 F. Supp. 182 (S.D.N.Y. 1991), in which the judge found that a Black artist committed

I discuss how adding copyright protection for social dances would play out in litigation.

1. *De Minimis* and Fair Use Defense

Adding copyright protection for social dances should not result in liability for someone performing a dance at home or at a party. The *de minimis* and fair use defenses would protect these non-commercial uses of the choreography and would ensure the goals of copyright protection were met. *De minimis non curat lex* is a legal maxim that protects people from liability who commit insignificant violations of the rights of others.[136] The *de minimis* defense considers the amount of copyrighted work that was copied and the observability of the copyrighted work in the infringing work.[137] If someone were to perform a copyrighted dance at home or at a party, that performance seems to fall under the *de minimis* defense. Without additional aggravating factors, there would be no benefit to suing that non-commercial performer, and the legal system would be unlikely to concern itself with that insignificant violation. If the performer became associated with the copyrighted dance or began to profit from performing the dance, then the *de minimis* defense would no longer be applicable.

Fair use is a limitation on the exclusive rights to a copyright and protects uses of copyrighted materials for criticism, comment, news reporting, teaching, scholarship, or research.[138] In determining whether the use of a work is fair use, the court considers factors such as (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[139]

The Fair Use Doctrine protects choreographers who create new dances based on only a few steps from a pre-existing dance. The third factor of the fair use defense considers the amount and substantiality of the portion used in relation to the copyrighted work as a whole. If a company were to take a pre-existing dance directly from what the choreographer created, then that would not be protected under the Fair Use Doctrine.

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copyright infringement by sampling music without permission and referred the artist for criminal prosecution, creating a barrier to Hip Hop artists creating music, Hip Hop being the genre commonly associated with sampling.

[136] Ringgold v. Black Entm't TV, Inc., 126 F.3d 70, 74 (2d Cir. 1997).

[137] ECIMOS, LLC v. Carrier Corp., 971 F.3d 616, 629-30 (6th Cir. 2020).

[138] 17 U.S.C. § 107.

[139] *Id.*

The real issue with companies using the choreography of others is in the company profiting from that use, as seen in the Epic Games cases. The first factor of the fair use defense addresses this issue and protects the average non-commercial dancer who performs another's choreography from copyright infringement claims. If that dancer starts profiting from performance of another's choreography through posting videos of the performance on social media and monetization of those videos, then the dancer would not be protected under the fair use defense.

2. Public Domain

Under copyright law, copyright protection lasts from the creation of the copyrightable work until 70 years after the death of the creator.[140] Because social dances are common in and to the general public, it would make sense to limit the number of years for which the social dance is protectable before it enters the public domain. Public domain

> designates things which are owned by "the public"; that is, the entire state or community, and not by any private person. When a thing is common property, so that anyone can make use of it who likes, it is said to be *publici juris;* as in the case of light, air, and public water. [141]

Social dances, which are already prevalent in the community, should be available in the public domain sooner than the choreographic works already protected by copyright. When a dance is so pervasive that it is no longer associated with a single creator and has become a part of culture, it should enter the public domain. Dances like the twist[142] and the grapevine[143] have become a common part of culture over time, due in part to the fact that they are over 40 years old. Those dances have already become common parts of other dances and works, so it would not make sense to copyright those dances now. Those dance moves are already unofficially owned by the public. Social dances are unlike other copyrightable works, like books, plays, or movies, in that they are meant to be performed by the general public. Because they are

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[140] 17 U.S.C. §302(a).

[141] Edward Lee, *The Public Domain: The Evolution of Legal Restraints on the Government's Power to Control Public Access Through Secrecy or Intellectual Property*, 55 HASTINGS L.J. 91, 105 (2003).

[142] *See* Jennifer Rosenberg, *The Twist: A Worldwide Dance Craze in the 1960s*, THOUGHTCO (Sept. 23, 2019), https://www.thoughtco.com/the-twist-dance-craze-1779369 (describing the twist and stating that it was performed as early as 1960).

[143] *See* TROY KINNEY & MARGARET WEST KINNEY, THE DANCE: ITS PLACE IN ART AND LIFE 278 (1914), http://www.gutenberg.org/files/50056/50056-h/50056-h.htm (describing the grapevine as early as 1914).

created to be performed by everyone, if social dances become a copyrightable subject matter, then they should have a shorter duration of copyright protection.

3. Derivative Works

Another argument against granting copyright protection to social dances is that these short dances are the building blocks of larger dances and would thus stifle creativity by preventing other choreographers from creating works incorporating those other moves.[144] There is a substantial difference between the second position in ballet[145] compared to "The Carlton,"[146] which the U.S. Copyright Office both considers to be too simple to warrant copyright protection. Whereas one could accidentally perform the second position in ballet, either in everyday movement or within another dance, performing "The Carlton" requires some level of skill and effort.

Social dances are not likely to be the building blocks of longer dances because they are already full dances. Social dances, by their very name, are already dances. Social dances, like "The Carlton" or "Milly Rock," do not fit in with the rest of the list of moves that are explicitly listed by the U.S. Copyright Office as non-protectable. The U.S. Copyright Office should eliminate social dances from the list of non-protectable dances and grant copyright protection to them.

IV. CONCLUSION

Knight's successful copyrighting of his choreography for Beyoncé demonstrates the progress that has been made in expanding copyright protection for choreographic works to styles of dance other than ballet. Due to the differences between traditional ballet and more modern styles of dance, like hip hop and jazz, more clarity is needed from the legislature and the Copyright Office on what is and what is not copyrightable. The legislature should pass new copyright laws expanding the scope of copyrightable material to reflect the recent developments in social media and dance, thereby ensuring more equitable copyright protection for all creators. Doing so would

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[144] Chandler Martin, *Whose Dance Is It Anyway?: Carving Out Protection for Short Dances in the Fast-Paced Digital Era*, 98 N.C.L. REV. 1001, 1015-1017 (2020).

[145] *See* HowcastArtsRec, *How to Do the 5 Basic Positions | Ballet Dance*, YOUTUBE (Oct. 28, 2011), https://www.youtube.com/watch?v=b3bawTEPLtA (demonstrating this position).

[146] *See* Cridiron, *The Carlton Dance,* YOUTUBE (Aug. 15, 2006), https://www.youtube.com/watch?v=zS1cLOIxsQ8 (demonstrating this choreography).

eliminate the discretion given to Copyright Office specialists in determining, seemingly arbitrarily, what type of choreography is or is not protectable.[147] Expanding copyright protection to different styles of choreography would ideally protect smaller creators from large corporations while protecting people of color from having their creations stolen, like the Jimmy Fallon and Addison Rae instance and the plot of the movie *Bring It On*.

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[147] Hutton-Work, *supra* note 125, at 164.