

## Whose Dance Is It Anyway?: Carving Out Protection for Short Dances in the Fast-Paced Digital Era\*

*Recent controversy concerning the unauthorized depiction of certain short dances in the popular video game Fortnite has sparked debate over whether artists who create or popularize short dances have any legal rights in those dances. This Recent Development argues that short dances should be afforded some opportunity for legal protection. It further analyzes which of the proposed modes of protection is more appropriate: copyright or the right of publicity. For policy reasons, this Recent Development concludes that, despite the inherent challenges, the right of publicity provides the best route to some limited form of protection for artists' rights in short dances.*

### INTRODUCTION

Goldfish are remarkable creatures. They come in many different colors, can weigh up to four pounds in the wild, and can even differentiate music made by different composers.<sup>1</sup> Notably, goldfish and humans share one very important quality: a short attention span. According to a study by Microsoft, the human attention span dropped from an average of twelve seconds in 2000 to eight seconds in 2015—that is one second shorter than the attention span of a goldfish.<sup>2</sup> This reduced attention span has far reaching implications as it affects social media platforms,<sup>3</sup> advertising,<sup>4</sup> and perhaps even our ideas of intellectual property law. We get news from flash briefings,<sup>5</sup> enjoy short clips on platforms like TikTok,<sup>6</sup> and watch short dances like “the Carlton”<sup>7</sup> and “the

\* © 2020 Chandler Martin.

1. Michele Debczak, *9 Colorful Facts About Goldfish*, MENTAL FLOSS (Oct. 23, 2018), <http://mentalfloss.com/article/90963/9-colorful-facts-about-goldfish> [<https://perma.cc/3CXQ-QJK6>].

2. Kevin McSpadden, *You Now Have a Shorter Attention Span than a Goldfish*, TIME (May 14, 2015), <http://time.com/3858309/attention-spans-goldfish/> [<https://perma.cc/GY6J-GKFW>].

3. See Olga Bedrina, *Ideal Video Length: How Long Should Your Social Video Be?* [Infographic], SOCIALLY SORTED (May 4, 2018), <https://sociallysorted.com.au/ideal-video-length-social-video/> [<https://perma.cc/K4RJ-5CB6>]; Ezra Fishman, *How Long Should Your Next Video Be?*, WISTIA (July 5, 2016), <https://wistia.com/learn/marketing/optimal-video-length> [<https://perma.cc/2RNG-ZWNG>].

4. Bedrina, *supra* note 3; Fishman, *supra* note 3.

5. “A flash briefing provides a quick overview of news and other content such as comedy, interviews, and lists.” *Understand the Flash Briefing Skill API*, AMAZON, <https://developer.amazon.com/en-US/docs/alexa/flashbriefing/understand-the-flash-briefing-skill-api.html> [<https://perma.cc/T3RC-VL6S>]; see also Todd Haselton, *Here Are a Bunch of Fun Tips and Tricks To Help You Get the Most Out of Your New Amazon Echo*, CNBC (Dec. 25, 2019), <https://www.cnn.com/2019/12/24/amazon-echo-tips-and-tricks.html> [<https://perma.cc/B2JF-KPG8>] (explaining the flash briefing news feature of the Amazon Echo).

6. TikTok is a short video platform or application that allows users to create fifteen-second video clips, which are nine seconds longer than the clips allowed on “the dearly departed app Vine.”

Floss.”<sup>8</sup> But how short is too short to qualify for copyright protection, and does our new obsession with bite-sized entertainment threaten the ability of artists to gain legal protection for their creative works?

Recent controversy concerning artists’ ability to legally protect short dances reveals that, at least in the context of choreographic works and dance moves, the answer to this question is plagued by uncertainty. The issue vaulted into the spotlight in late 2018 and early 2019 when multiple artists brought lawsuits against the video game developer Epic Games, Inc.<sup>9</sup> These lawsuits centered on Epic Games’ unauthorized use of certain short dance moves in the popular online game *Fortnite: Battle Royale* (“*Fortnite*”) as purchasable dance “emotes.”<sup>10</sup> In an effort to assert legal ownership or control over the appropriated dance moves, the plaintiffs alleged a variety of claims, including copyright infringement and violation of the right of publicity.<sup>11</sup> Notably, many of the *Fortnite* cases have been voluntarily dismissed for the time being<sup>12</sup> to comply with the recent Supreme Court decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*<sup>13</sup>. In that case, the Supreme Court ruled that prospective plaintiffs must await a decision from the U.S. Copyright Office on a copyright application before filing a copyright

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Heather Schwedel, *A Guide to TikTok for Anyone Who Isn't a Teen*, SLATE (Sept. 4, 2018), <https://slate.com/technology/2018/09/tiktok-app-musically-guide.html> [https://perma.cc/LT7T-97FJ].

7. See PhilanthroPwn, *Alfonso Ribeiro Doing the Carlton Dance in Public Compilation*, YOUTUBE (Oct. 21, 2015), <https://www.youtube.com/watch?v=-4Qy8XCLGY4&t=11s> [https://perma.cc/Q6K9-R8S5].

8. See Deepak Tulsyan, *How To Do the Backpack Kid Dance (The Floss): Deepak Tulsyan Dance Tutorial*, YOUTUBE (Sept. 27, 2018), <https://www.youtube.com/watch?v=0Kj3wWKjMSQ> [https://perma.cc/2929-RZN5].

9. See generally Craig Snyder, *Every Fortnite Dance Move Epic Has Been Sued Over and Why*, TWINFINITE (Jan. 16, 2019), <https://twinfinite.net/2019/01/every-fortnite-dance-move-lawsuit/> [https://perma.cc/27ST-GYLE] (discussing lawsuits brought against Epic Games by rapper “2 Milly” and actor Alfonso Ribeiro, as well as by the more obscure internet celebrities “Backpack Kid” and “Orange Shirt Kid”).

10. *Id.*

11. See Complaint at 11–23, *Baker v. Epic Games, Inc.*, No. 2:19-cv-00505 (C.D. Cal. Jan. 23, 2019) (including the additional claims of unfair competition, trademark infringement, and trademark dilution); Complaint at 12–25, *McCumbers ex rel. C.C.M. v. Epic Games, Inc.*, No. 2:19-cv-00260 (C.D. Cal. Jan. 11, 2019) (including the additional claims of unfair competition, trademark infringement, and trademark dilution); Complaint at 11–25, *Redd ex rel. Horning v. Epic Games, Inc.*, No. 2:18-cv-10444 (C.D. Cal. Dec. 17, 2018) (including the additional claims of unfair competition, false designation of origin, trademark infringement, and trademark dilution) [hereinafter *Redd Complaint*]; Complaint at 10–20, *Ribeiro v. Epic Games, Inc.*, No. 2:18-cv-10412 (C.D. Cal. Dec. 17, 2018) [hereinafter *Ribeiro Complaint*] (including additional claims of unfair competition); Complaint at 10–19, *Ferguson v. Epic Games, Inc.*, No. 2:18-cv-10110 (C.D. Cal. Dec. 5, 2018) [hereinafter *Ferguson Complaint*] (including an additional claim of unfair competition).

12. Austen Goslin, *Fortnite Dance Lawsuits Dismissed After New Supreme Court Ruling*, POLYGON (Mar. 11, 2019), <https://www.polygon.com/fortnite/2019/3/11/18260142/fortnite-dance-lawsuits-dismissed> [https://perma.cc/T9RK-SVLS] [hereinafter Goslin, *Lawsuits Dismissed*].

13. 139 S. Ct. 881 (2019).

infringement action in court.<sup>14</sup> While the legal battle is on pause for the time being, the cases still raise interesting questions. Should short dances, comprised of only a couple of dance moves, be legally protectable? If so, which legal avenue provides a better path to protection: copyright or the right of publicity?

This Recent Development argues that short dances should be afforded some opportunity for legal protection. Furthermore, it examines the dances from the *Fortnite* cases to determine which path to protection—copyright or the right of publicity—best accounts for the unique legal and policy considerations that arise with respect to short dances. Given the limits of copyright and the complexity of the right of publicity, neither legal avenue creates an easy, or assured, road to protection. On one hand, artists wishing to protect short dances via copyright law are faced with roadblocks in the form of originality and length requirements. On the other hand, those seeking protection under the right of publicity encounter obstacles including strong First Amendment protections,<sup>15</sup> inconsistencies in the right’s availability and coverage from state to state,<sup>16</sup> and constraints on what may legally constitute one’s “persona” or “likeness.”<sup>17</sup> For policy reasons, this Recent Development argues that, despite the inherent challenges, the right of publicity provides the best route to some limited form of protection for the creators of short dances.

Analysis proceeds in three parts. Part I discusses the background and major claims of the lawsuits against Epic Games. Part II analyzes whether copyright protection could, or should, protect short dances by examining the current state of the law and the potential ramifications of affording copyright protection to short dances like those at issue in the *Fortnite* cases. Part III examines whether such dances, if not protectable by copyright, can be extended protection under the state law right of publicity and briefly explores how a court would evaluate the interests underlying the right in light of potential First Amendment defenses.

### I. FORTNITE BACKGROUND AND CURRENT LITIGATION

Released in late 2017, the online game *Fortnite* quickly amassed a staggering audience.<sup>18</sup> By March 2019, the game had nearly 250 million

14. *Id.* at 891.

15. See 1 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 6:25 (2d ed.), Westlaw (database updated Apr. 2019).

16. See *id.* §§ 6:2, 6:4. Notably, the right of publicity is not recognized in every state. See *id.* § 6.2. As of April 2019, thirty-three states recognized a common law or statutory right of publicity. *Id.*

17. See *infra* Section III.A.

18. Brian Crecente, ‘Fortnite’ Dance Lawsuits: The Carlton, the Floss, the Milly Rock, What Is Going On?, VARIETY, <https://variety.com/2018/gaming/news/fortnite-dance-lawsuit-1203092141/> [https://perma.cc/3AGT-ZT3U]; see also Sarah LeBoeuf, What Is ‘Fortnite’?: A Look at the Video Game

registered players<sup>19</sup> and, by some accounts, became the highest earning game of 2018.<sup>20</sup> *Fortnite* is a multiplayer “open-world survival game, in which players collect resources, make tools and weapons, and try to stay alive as long as possible.”<sup>21</sup> However, players do more than merely fight for their lives—they also dance. While players battle to the death, their characters can purchase “emotes” that allow the online avatars to perform certain dance moves listed in the game such as “[t]he Floss, the Fresh, the Squat Kick, the Wiggle,” and many others.<sup>22</sup> While some have marveled that these “emotes” have found their way into the real world,<sup>23</sup> others are outraged that these dances, popularized by various celebrities, have been appropriated, implanted in the game, and then sold without the artists’ consent.<sup>24</sup> In fact, although playing *Fortnite* is free, the game generated approximately \$300 million per month in 2018 through in-game sales.<sup>25</sup> One component of these in-game sales is dance emotes.<sup>26</sup>

With the rise in popularity of the game, artists began to take notice of these dance emotes and several were shocked to find that dance moves they considered their own had been appropriated and sold in the game without their permission.<sup>27</sup> Popular artists and activists have consequently criticized Epic Games, urging the company to attribute the dances to the appropriate

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that Has Become a Phenomenon, NBC NEWS (June 30, 2018), <https://www.nbcnews.com/tech/tech-news/what-fortnite-look-video-game-has-become-phenomenon-n887706> [https://perma.cc/3WAD-THAE].

19. Ben Gilbert, *How Big Is ‘Fortnite’? With Nearly 250 Million Players, It’s over Two-Thirds the Size of the US Population*, BUS. INSIDER (Mar. 20, 2019), <https://www.businessinsider.com/how-many-people-play-fortnite-2018-11> [https://perma.cc/W6K7-CS5F].

20. Kevin Webb, *‘Fortnite’ and Other Free Games Raked In More Than \$87 Billion Last Year, and the Rest of the Gaming Industry Is Starting To Take Note*, BUS. INSIDER (Jan. 20, 2019), <https://www.businessinsider.com/free-to-play-games-fortnite-earnings-2018-data-2019-1> [https://perma.cc/UH4L-EY8T].

21. LeBoeuf, *supra* note 18.

22. Nick Paumgarten, *How Fortnite Captured Teens’ Hearts and Minds*, NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/how-fortnite-captured-teens-hearts-and-minds> [https://perma.cc/UD3K-LWEU]; see also Deathmule, *Fortnite All Dances Season 1-10*, YOUTUBE (Aug. 1, 2019), <https://www.youtube.com/watch?v=HHPDIXwOxDc> [https://perma.cc/HJ5G-JF86] (depicting a variety of *Fortnite* emotes); H-Matter, *\*All\* 240 Fortnite Dances/Emotes (Season 1 to Season X)*, YOUTUBE (Aug. 17, 2019), <https://www.youtube.com/watch?v=tXhOzX0nxNU> [https://perma.cc/8EA5-HSJ5].

23. Paumgarten, *supra* note 22.

24. Crecente, *supra* note 18.

25. LeBoeuf, *supra* note 18.

26. See Andrew Webster, *Fortnite Made an Estimated \$2.4 Billion Last Year*, VERGE (Jan. 16, 2019), <https://www.theverge.com/2019/1/16/18184302/fortnite-revenue-battle-pass-earnings-2018> [https://perma.cc/D2WS-S9WZ] (noting that “much of *Fortnite*’s revenue comes from selling character skins and emotes” as well as “battle passes”).

27. See Crecente, *supra* note 18.

artists and share some of the game's profits with those artists.<sup>28</sup> A number of artists have since taken action and filed suit against Epic Games, alleging, among other claims, copyright and right of publicity infringement.<sup>29</sup> The plaintiffs include Terrence Ferguson, a rapper who goes by the name "2 Milly";<sup>30</sup> Alfonso Ribeiro, the actor who played Carlton Banks on *The Fresh Prince of Bel-Air*;<sup>31</sup> and R.H., a teenager who rose to internet fame as "Backpack Kid" after performing what became known as "the Floss" during a *Saturday Night Live* performance with pop artist Katy Perry.<sup>32</sup> Ribeiro's complaint, for example, alleges copyright and right of publicity infringement due to *Fortnite*'s unauthorized use of his dance "the Carlton" in the dance emote labeled "Fresh."<sup>33</sup> The complaint credits Ribeiro with the creation and popularization of the dance<sup>34</sup> and states that "[a]lthough misleadingly labeled in *Fortnite*, the emote . . . was immediately recognized by players and media worldwide as Ribeiro's The [Carlton]."<sup>35</sup> The complaints filed by Backpack Kid and 2 Milly contain similar claims of copyright and right of publicity infringement for Epic Games' alleged misappropriation of their respective dances, "the Floss" and "the Milly Rock."<sup>36</sup>

As noted earlier, in March 2019, most of the claimants voluntarily dismissed their cases.<sup>37</sup> The law firm handling most of the *Fortnite* cases—including Ribeiro's, Backpack Kid's, and 2 Milly's cases—released a statement that defended the merit of the claims and instead attributed the dismissals to

28. See *id.* (highlighting arguments made by others, such as Chance the Rapper, who called for Epic Games to give credit to the artists who created the dances by including their rap songs in the game, and BlocBoy JB, who argued that he deserves credit for a dance he popularized that appears in the game).

29. See *id.*; see also sources cited *supra* note 11. Ribeiro, Backpack Kid, and 2 Milly also sued the developer of the game *NBA 2K* for the use of the dance moves. See Complaint at 1, Ferguson v. Take-Two Interactive Software, Inc., No. 2:18-cv-10425 (C.D. Cal. Dec. 17, 2018); Complaint at 1, Redd v. Take-Two Interactive Software, Inc., No. 2:18-cv-10441 (C.D. Cal. Dec. 17, 2018); Complaint at 1, Ribeiro v. Take-Two Interactive Software, Inc., No. 2:18-cv-10417 (C.D. Cal. Dec. 17, 2018).

30. Ferguson Complaint, *supra* note 11, at 1.

31. Ribeiro Complaint, *supra* note 11, at 1.

32. Redd Complaint, *supra* note 11, at 1.

33. Ribeiro Complaint, *supra* note 11, at 10–18.

34. *Id.* at 11.

35. *Id.* at 1.

36. See Redd Complaint, *supra* note 11, at 11–18; Ferguson Complaint, *supra* note 11, at 10–17. For the most part, the plaintiffs sought to stop Epic Games from using their claimed dances and likenesses in the game and wanted an award of money damages. See, e.g., Redd Complaint, *supra* note 11, at 25–27; Ferguson Complaint, *supra* note 11, at 19–20.

37. See Order Dismissing Action on Notice of Voluntary Dismissal, Ferguson v. Epic Games, Inc., No. 2:18-cv-10110 (C.D. Cal. Mar. 7, 2019); Notice of Dismissal, Redd v. Epic Games, Inc., No. 2:18-cv-10444 (C.D. Cal. Mar. 7, 2019); Order Dismissing Action on Notice of Voluntary Dismissal, Ribeiro v. Epic Games, Inc., No. 2:18-cv-10412 (C.D. Cal. Mar. 7, 2019); see also Goslin, *Lawsuits Dismissed*, *supra* note 12; Liz Lanier, *Artists Temporarily Drop 'Fortnite' Lawsuits After Supreme Court Ruling*, VARIETY (Mar. 11, 2019), <https://variety.com/2019/gaming/news/artists-temporarily-drop-fortnite-lawsuits-copyright-1203159985/> [<https://perma.cc/V2Z5-WSNB>].

changed procedural requirements following the Supreme Court's recent decision in *Fourth Estate Public Benefit Corp.*<sup>38</sup> Although copyright registration has always been a strict requirement for infringement actions,<sup>39</sup> the term "registration" previously had different meanings depending on the federal circuit in which the case was filed. Some circuits had held that the filing of a copyright application sufficed while others had required official registration by the Copyright Office before a case could proceed.<sup>40</sup> The Supreme Court resolved this circuit split by holding that the term "registration" as used in the statute requires the Copyright Office to have acted upon the claimant's application (by registering or denying it) before the claimant can file a lawsuit; merely filing an application is not sufficient.<sup>41</sup> Because many of the *Fortnite* lawsuits were filed immediately after the plaintiffs submitted copyright applications but before any official action by the Copyright Office (or were filed during the Copyright Office's process of reconsideration), the plaintiffs voluntarily withdrew their lawsuits.<sup>42</sup> A representative of the *Fortnite* plaintiffs released a statement noting that they intend to refile the lawsuits after receiving their registration decisions from the Copyright Office.<sup>43</sup>

Despite the dismissal of the *Fortnite* cases, speculation and doubt abound as to whether artists have any legal rights in short dances.<sup>44</sup> Picking up the

38. *Pierce Bainbridge Continues To Fight for Entertainers in Dance Emote Cases*, CISION: PR NEWswire (Mar. 7, 2019), <https://www.prnewswire.com/news-releases/pierce-bainbridge-continues-to-fight-for-entertainers-in-dance-emote-cases-300808919.html> [https://perma.cc/ZG5D-P2EC] [hereinafter *Pierce Bainbridge Continues To Fight*]; see also Goslin, *Lawsuits Dismissed*, *supra* note 12; Adi Robertson, *Most of the Fortnite Dance Lawsuits Are on Pause*, VERGE (Mar. 9, 2019), <https://www.theverge.com/2019/3/9/18257385/epic-fortnite-lawsuit-ribeiro-2milly-dance-emote-lawsuits-withdrawn-pause-registration> [https://perma.cc/83K8-VVQC] [hereinafter Robertson, *On Pause*].

39. See 17 U.S.C. § 411(a) (2018) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."); 2 DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16, LexisNexis (database updated Dec. 2019) ("[R]egistration is a condition precedent for an infringement case to move forward in federal court.").

40. *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) (recognizing a circuit split where the Eleventh Circuit required the Register of Copyrights to actually have registered the copyright while the Ninth Circuit required only that the Copyright Office receive the completed application).

41. See *id.* at 892 ("For the reasons stated, we conclude that 'registration . . . has been made' within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application.").

42. See Goslin, *Lawsuits Dismissed*, *supra* note 12; Robertson, *On Pause*, *supra* note 38.

43. *Pierce Bainbridge Continues To Fight*, *supra* note 38.

44. See Daniel Cooper, *The 'Fortnite' Dance Lawsuits Are Close to Falling Apart*, ENGADGET (Feb. 15, 2019), <https://www.engadget.com/2019/02/15/the-fortnite-dance-lawsuits-are-close-to-falling-apart/> [https://perma.cc/P9ER-9ZK9]; Michelle Kaminsky, *How Strong Is Alfonso Ribeiro's 'Carlton Dance' Lawsuit Against Fortnite Creator?*, FORBES (Dec. 31, 2018), <https://www.forbes.com/sites/michellefabio/2018/12/31/how-strong-is-alfonso-ribeiros-carlton-dance-lawsuit-against-fortnite-creator/> [https://perma.cc/89WW-BSEW].

proverbial torch, additional artists recently emerged from the shadows with similar claims of copyright or right of publicity infringement.<sup>45</sup> Thus, the question triggered by the *Fortnite* cases remains: Can the creators of short dances claim any type of legal protection?

## II. BUST A MOVE: THE NEBULOUS COPYRIGHT ZONE IN WHICH SHORT OR REPETITIVE DANCE MOVES CURRENTLY RESIDE

Most of the *Fortnite* cases included both copyright and right of publicity infringement claims stemming from Epic Games' unauthorized use of certain dances as emotes within the game.<sup>46</sup> Although similar in some regards, the two doctrines vary substantially—not only in the requirements for obtaining protection but also in the type and scope of protection afforded. Copyright infringement actions are federal claims arising under the Copyright Act of 1976 ("Copyright Act"), which grants protection for a limited amount of time to the original and fixed expression of ideas that fall under one of the eight statutorily enumerated categories.<sup>47</sup> By contrast, right of publicity claims arise out of either state common law or state statutes and focus on whether the persona or likeness of an individual has been appropriated for some commercial gain without consent.<sup>48</sup> In order to better understand the differences between these two potential pathways to protection and determine which path is a better fit for short dances, I will analyze each of them separately and in the context of the *Fortnite* cases. However, before delving into which potential route to protection artists should take, another more basic

45. See Adi Robertson, *Epic Is Accused of Stealing 'Dancing Pumpkin Man' Look for a Fortnite Dance*, VERGE (Dec. 9, 2019), <https://www.theverge.com/2019/12/9/21002661/epic-fortnite-lawsuit-dancing-pumpkin-man-matt-geiler-non-infringement-declaration> [https://perma.cc/4RTR-RGZN] (discussing Epic Games' preemptive lawsuit against Matt Geiler, also known as the "Dancing Pumpkin Man," seeking a declaratory judgment that Epic Games did not violate Geiler's copyright or trademark rights after Geiler allegedly sent a cease-and-desist letter indicating an intention to sue Epic Games over "the use of his likeness" in the emote "Pump it Up"); Nick Statt, *Saxophone Player Sues Epic over Fortnite's Saxophone Emote*, VERGE (Apr. 25, 2019), <https://www.theverge.com/2019/4/25/18516306/fortnite-epic-games-phone-it-in-saxophone-emote-lawsuit-leo-pellegrino-likeness> [https://perma.cc/79T3-RRA6] (explaining that a New York City-based saxophonist sued *Fortnite* solely over a "misappropriation of likeness" due to a dance emote called "Phone It In" which he claims copies his saxophone dance); see also Adi Robertson, *Epic Is Getting Sued for Putting the 'Running Man' Dance in Fortnite*, VERGE (Feb. 26, 2019), <https://www.theverge.com/2019/2/26/18241793/epic-fortnite-running-man-dance-copyright-lawsuit-jaylen-brantley-jared-nickens> [https://perma.cc/KX78-L7Q2] (discussing a lawsuit over the "Running Man" emote); Robertson, *On Pause*, *supra* note 38 (noting that the "Running Man" lawsuit has not been dismissed like the other cases).

46. See *supra* note 11 and accompanying text.

47. See 17 U.S.C. § 102(a) (2018). See generally Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

48. See, e.g., *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 346 (Cal. Ct. App. 1983).

question must be answered: Should artists receive any protection whatsoever in short dances?

A. *A Preliminary Matter: Should Short Dances Be Protectable?*

A valid question exists regarding whether short dances should be entitled to any type of legal protection. Because the moves are short and relatively simple, it is tempting to exclude such short dances from legal protection altogether. However, such a dismissal would be overly hasty. Many of the theories behind the protection of other intellectual property rights, and property rights more generally, still apply to these short dances. For instance, copyright law offers protection primarily to incentivize people to create and contribute their creations to society.<sup>49</sup> The right of publicity arguably does something similar.<sup>50</sup> By allowing short dances to receive some sort of protection, creators would theoretically be incentivized to spend the time and energy to create unique dance moves. The counterargument, however, is that, given the brevity of these dances, it is less likely that creators need an incentive to create since the creation itself takes less time. While that may be true, it is usually not a factor considered by copyright law.<sup>51</sup> Even short dances, if sufficiently original or distinctive, may offer some notable contribution to the progress of the arts and therefore be worthy of protection.

Moreover, granting some form of protection could also reward the creators of these short dances, or at least those who popularize them. The idea that one should have some rights in something they have either created or worked to popularize is not entirely foreign to United States jurisprudence. Although U.S. copyright law ultimately rejected the “sweat of the brow” theory, which awards protection based on the hard work a creator put into a final product,<sup>52</sup> similar theories exist elsewhere in property law. One basic theory of property law holds that if a person mixes his own labor with natural resources, then he can acquire a property interest in that thing.<sup>53</sup> Even though,

49. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).

50. See 1 MCCARTHY & SCHECHTER, *supra* note 15, § 2:6 (explaining the incentive justification for right of publicity but noting that a number of circuits have rejected this theory).

51. For example, photographs are eligible for copyright protection even though they can be taken in an instant. See *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450–53 (S.D.N.Y. 2005). Moreover, photographers can meet the originality requirement “by being at the right place at the right time” and snapping a unique photograph without much planning or time investment. See *id.* 452–53 (internal quotation marks omitted) (quoting HUGH LADDIE, PETER PRESCOTT & MARY VITORIA, *THE MODERN LAW OF COPYRIGHT AND DESIGNS* § 4.57, at 229 (3d ed. 2000)).

52. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352–53 (1991) (discussing the sweat-of-the-brow theory in relation to compilations).

53. JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 3–4 (3d ed. 2012) (explaining John Locke’s theory that “when a person ‘mixed’ his own



in this instance, the labor is not mixed with physical property, the idea still transfers to short dances, as the artists have put effort into creating and popularizing the dances.

Similarly, the theory of unjust enrichment may also support the protection of short dances in this instance. After all, if a company can use something it neither created nor popularized that invokes the identity of another person to promote its own product without that person's consent, it unfairly benefits from the work of another.<sup>54</sup> Because existing property theories help justify the protection of short dances, this Recent Development will assume that short dances should be offered the opportunity of legal protection. Consequently, it focuses analysis predominately on which avenue of protection is the best fit: copyright or the right of publicity.

#### B. *Current Copyright Law as Applied to Emotes*

Copyright is a complex field of law that has expanded and adapted throughout the years to better encourage innovation and offer meaningful protection to artists.<sup>55</sup> The foundation for copyright law is set out in the U.S. Constitution, which states that Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>56</sup> To warrant this constitutional protection, works must overcome a number of hurdles. First, the work must be “fixed in [a] tangible medium of expression.”<sup>57</sup> Second, the work must be original, meaning that it was “independently created” and also “possesses at least some minimal degree of creativity.”<sup>58</sup> With respect to this requirement, the “requisite level of creativity is extremely low; even a slight amount will suffice.”<sup>59</sup> Lastly, the work must fit into one of the eight enumerated protected categories in 17 U.S.C. § 102(a), such as literary works, motion pictures, or choreographic works,<sup>60</sup> and the work cannot simply be an idea, method, or process.<sup>61</sup>

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labor (which he owned) with natural resources (which were unowned), he acquired property rights in the mixture” and noting that the theory has “profoundly influenced American property law”).

54. See generally 1 MCCARTHY & SCHECHTER, *supra* note 15, § 2.2 (discussing briefly unjust enrichment as a theory for justifying the right of publicity).

55. See 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03, LexisNexis (database updated Dec. 2019) (“[T]he authorization to grant copyright to individual authors is predicated on the dual premises that the public benefits from the creative activities of authors and that copyright protection is a necessary condition to the full realization of those creative activities.”).

56. U.S. CONST. art. I, § 8, cl. 8.

57. 17 U.S.C. § 102(a) (2018).

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

59. *Id.*

60. The eight protected categories include (1) literary works; (2) musical works; (3) dramatic works; (4) choreographic works; (5) “pictorial, graphic, and sculptural works”; (6) motion pictures; (7) sound recordings; and (8) architectural works. 17 U.S.C. § 102(a).

These requirements pose a number of obstacles for artists attempting to obtain copyright protection for short dance moves. Fixation and originality pose the first barriers for artists. However, these requirements themselves are not impossible to overcome. First, fixation would likely not pose an issue, because if the short dances were recorded in some fashion,<sup>62</sup> like those at issue in the *Fortnite* cases, they would likely meet the fixation requirement.<sup>63</sup> With respect to originality, the *Fortnite* plaintiffs could likely prove that the dances at issue possess the requisite degree of creativity, which poses only a low bar, since dances like the Carlton and the Milly Rock have some degree of creativity in their choices regarding arrangement and rhythm of each body movement.<sup>64</sup>

However, to satisfy the originality requirement, the short dances in question must also be independently created.<sup>65</sup> This element may present a higher hurdle for short dances. Longer dances have a higher likelihood of being original since an artist does not have to be the creator of each individual move, but instead may meet the bar for originality in his or her selection, arrangement, and organization of particular dance moves into an organized whole.<sup>66</sup> By contrast, artists of short dances consisting of only one or two movements are less likely to have originality in their selection, arrangement, or organization and therefore would likely have to prove that they invented the specific dance move in question. This is a slightly higher bar, and one many of the *Fortnite* plaintiffs likely could not meet. For example, the Floss likely fails to meet this particular requirement since the dance surfaced as early as 2010 and Backpack Kid merely popularized—not created—the dance.<sup>67</sup> Similar doubt clouds Ribeiro's and 2 Milly's claims regarding the creation of

61. See *id.* § 102(b).

62. Fixation requires the work to be fixed in a “tangible medium of expression . . . by or under the authority of the author” for a long enough period of time that the work can be perceived. *Id.* § 101.

63. See, e.g., HopMedia, *Alfonso Ribeiro Doing the Carlton on DWTS!!!!*, YOUTUBE (Oct. 7, 2014), [https://www.youtube.com/watch?v=pbSCWgZQf\\_g&t=68s](https://www.youtube.com/watch?v=pbSCWgZQf_g&t=68s) [<https://perma.cc/FRH2-KBHF>]; Inside Edition, *Meet the Dancing ‘Backpack Kid’ Who Stole Katy Perry’s Spotlight on ‘SNL,’* YOUTUBE (May 22, 2017), <https://www.youtube.com/watch?v=6X6b19ukfTA> [<https://perma.cc/ZK98-UAHJ>]; Meerkat011, *The Fresh Prince of Bel-Air—Carlton Dancing to Tom Jones*, YOUTUBE (Aug. 2, 2009), <https://www.youtube.com/watch?v=Lxqa2Haf8lo> [<https://perma.cc/U2U4-H9GM>].

64. See *Feist Publ'ns, Inc.*, 499 U.S. at 345 (discussing the originality requirements).

65. See *id.* (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity . . .”).

66. See *id.* at 348 (noting, in the context of factual works, that “choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws”); see also *infra* notes 80–83 and accompanying text.

67. See Larch, *No “Backpack Kid” Did Not Invent the Floss Dance . . .*, SUITABLY BORED (Dec. 25, 2018), <https://g33kp0rn.wordpress.com/2018/12/25/no-backpack-kid-did-not-invent-the-floss-dance/> [<https://perma.cc/J8QQ-9MSB>].

their respective dances, as both have at some point attributed their dances to others.<sup>68</sup> If, however, an artist could prove that they created their move independently, they may have a shot at copyright protection.

Surprisingly, it is not the originality requirement but the limitation of copyright protection to the eight enumerated categories that creates the largest issue for the copyrightability of short dances like the Carlton or the Floss. While these short dances might seem, by way of common sense, to fall into the eligible “choreographic works” category, fitting short dances into this category is more challenging than it first appears.

Although Congress added choreographic works to the enumerated list of protected works via the Copyright Act,<sup>69</sup> what actually constitutes a “choreographic work” is far from clear. The statute’s definition section provides incredibly detailed definitions for terms such as “literary works,” “computer program,” “motion pictures,” and even “copies,”<sup>70</sup> yet it does not in any way define or even hint as to what may constitute a choreographic work. This omission was deliberate: the House Report on the Copyright Act explained that the term was not defined due to its “fairly settled meaning[.]”<sup>71</sup> An earlier report that preceded the Copyright Act further expressed the position that an “abstract dance” with no clear storyline or dramatic nature that met the requisite originality requirement could be granted protection.<sup>72</sup> However, the House Report also indicated a substantial restriction on the protection of choreographic works when it stated that such works do not “include social dance steps and simple routines.”<sup>73</sup> What the House Report did not do, however, was define either a “social dance step” or a “simple routine.”

Fortunately, the Copyright Office issued helpful guidance on determining what dances may fall into these unprotected categories in a 2017 circular.<sup>74</sup> The circular expressly stated that “[i]ndividual movements or dance

68. See Megan Cassidy, *The Surprising Truth Behind the Iconic Fresh Prince ‘Carlton Dance,’* HER, <https://www.her.ie/entertainment/the-surprising-truth-behind-the-iconic-fresh-prince-carlton-dance-252358> [<https://perma.cc/AR8K-Y5XC>] (noting that Ribeiro has attributed the dance to Courtney Cox and Eddie Murphy); GlobalGrindTV, *2 Milly Shows How To Do the Milly Rock Dance*, YOUTUBE (May 12, 2015), [https://www.youtube.com/watch?v=uY3uh\\_pIQ0g](https://www.youtube.com/watch?v=uY3uh_pIQ0g) [<https://perma.cc/29SN-4WW8>] (showing 2 Milly explaining that he first saw the dance being performed by someone else).

69. Leslie Erin Wallis, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1443 (1986).

70. See 17 U.S.C. § 101 (2018).

71. H.R. REP. NO. 94-1476, at 53 (1976); Wallis, *supra* note 69, at 1452.

72. STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 17 (Comm. Print 1961) (internal quotation marks omitted); see also 1 NIMMER, *supra* note 55, § 2.07[B]; Wallis, *supra* note 69, at 1448–49.

73. H.R. REP. NO. 94-1476, at 54.

74. Circulars are informational documents “published by the Copyright Office to provide up-to-date and authoritative information to a general audience.” *Circulars*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/> [<https://perma.cc/F4NY-NN5B>].

steps” including the “basic waltz step” and the “second position in classical ballet” are not copyrightable in and of themselves.<sup>75</sup> Furthermore, the Copyright Office explained that it “cannot register short dance routines consisting of only a few movements or steps with minor linear or spatial variations, even if a routine is novel or distinctive.”<sup>76</sup> Examples of movements or dances highlighted by the Copyright Office that do not qualify as choreographic works for the purposes of copyright protection include “[y]oga positions” and “[a] celebratory end zone dance move or athletic victory gesture.”<sup>77</sup>

The Copyright Office has also stated in its *Compendium*<sup>78</sup> that, unlike copyrightable choreographic works, “social dances are not intended to be performed for an audience; they are typically performed for the personal enjoyment of the dancers themselves” and are generally not created for professional dancers.<sup>79</sup> With these examples and standards, the hazy category of “choreographic works” slowly emerges from the murky zone in which it lingered since Congress left the term undefined in the Copyright Act.

This recent guidance led the Copyright Office to reject the registration of a number of the short dances involved in the *Fortnite* cases. With respect to Ribeiro, the Copyright Office rejected two of his three applications involving the Carlton dance.<sup>80</sup> In its letters denying registration, the Copyright Office stressed that “the term ‘choreography’ is not synonymous with ‘dance’” and further explained that the “Office defines choreography as the composition and arrangement of a related series of dance movements and patterns organized into an integrated, coherent, and expressive whole.”<sup>81</sup> Based on this interpretation, the Copyright Office rejected two of Ribeiro’s applications, one it characterized as “consist[ing] of a single dance step, popularly known as ‘The Carlton,’”<sup>82</sup> and the other it described as a “simple routine made up of three dance steps, the first of which is popularly known as ‘The Carlton.’”<sup>83</sup>

75. U.S. COPYRIGHT OFFICE, CIRCULAR 52: COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 3 (2017) [hereinafter CIRCULAR 52], <https://www.copyright.gov/circs/circ52.pdf> [<https://perma.cc/ASZ8-YE37>].

76. *Id.*

77. *Id.*

78. The Copyright Office’s *Compendium* is an internal guidance manual that “provides instruction to agency staff regarding their statutory duties and provides expert guidance to copyright applicants, practitioners, scholars, the courts, and members of the general public regarding institutional practices and related principles of law.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES 1 (3d ed. 2014) [hereinafter COMPENDIUM], <https://www.copyright.gov/comp3/docs/compendium.pdf> [<https://perma.cc/5NL5-D5EY>].

79. *Id.* § 805.2(E).

80. See Declaration of Dale M. Cendali, Esq. in Support of Notice of Motion and Motion to Dismiss at exhibits H, K, Ribeiro v. Epic Games, Inc., No. 2:18-cv-10412 (C.D. Cal. Dec. 17, 2018).

81. *Id.*

82. *Id.* at exhibit K.

83. *Id.* at exhibit H.

Backpack Kid's attempted registrations faced similar roadblocks. Of Backpack Kid's two attempted registrations, the Copyright Office rejected the application showing only the contested short dance, the Floss.<sup>84</sup> Moreover, although it approved registration for a thirty-second dance routine that included the Floss along with numerous other moves, it cautioned that single dance moves included in the registered choreographic work could not be copyrighted.<sup>85</sup>

Despite the Copyright Office's actions, neither its recent denial of registration for short dance moves nor the guidance offered in its circular and *Compendium* entirely excludes short dances from the possibility of copyright protection. Notably, courts are not bound by the Copyright Office's registration opinions or the guidance contained in the *Compendium* and circulars and can therefore disregard the Office's position or overturn its grant or denial of a registration.<sup>86</sup> The issue thus becomes not whether a court could feasibly disregard the Copyright Office's guidance regarding short dances and its decisions pertaining to the *Fortnite* cases, but whether it should.

### C. Legal Rationale for Denying Copyright Protection for Short Dance Moves

If given the opportunity, courts should adopt the Copyright Office's interpretation of the term "choreography" and explicitly reject copyright protection for social dance steps or short dances involving only a couple of steps. When considering an issue on which the Copyright Office has published an opinion, courts grant *Skidmore* deference to the Copyright Office's guidance as long as the guidance or interpretation in question does "not conflict with the express statutory language of the Copyright Act."<sup>87</sup>

84. Declaration of Dale M. Cendali, Esq. in Support of Notice of Motion and Motion to Dismiss at exhibit G, *Redd v. Epic Games, Inc.*, No. 2:18-cv-10444 (C.D. Cal. Dec. 17, 2018).

85. See *id.* at exhibit D; Elizabeth A. Harris, *Carlton Dance Not Eligible for Copyright*, *Government Says*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/arts/dance/carlton-dance.html> [<https://perma.cc/X2RS-76HB> (dark archive)].

86. See *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 478–79 (6th Cir. 2015) (collecting cases and noting that the Copyright Office's *Compendium*, registration decisions, and circulars are usually afforded only *Skidmore* deference), *aff'd*, 137 S. Ct. 1002 (2017); see also *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946–47 (2d Cir. 1975) ("[T]he Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight."); Karen K. Williams & Gregory P. Stein, *Reading the Tea Leaves—Practical Insights from Case Law on Software Copyright Registration*, LANDSLIDE, May/June 2017, at 24, 26 (2017) (citing *Mortg. Mkt. Guide, LLC v. Freedman Report, LLC*, No. 06-cv-140-FLW, 2008 U.S. Dist. LEXIS 56871 (D.N.J. July 28, 2008)).

87. *Muench Photography, Inc. v. Houghton Mifflin Harcourt Publ'g Co.*, 712 F. Supp. 2d 84, 91 (S.D.N.Y. 2010); see also *Christensen v. Harris County*, 529 U.S. 576, 585 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505–06 (2d Cir. 2002) (granting *Skidmore* deference to the Copyright Office and therefore finding its interpretation "persuasive").

*Skidmore* deference is often understood to be an intermediate level of deference;<sup>88</sup> when applying it to copyright circulars and the *Compendium*, courts have considered the agency's interpretation "persuasive"<sup>89</sup> so long as it does not contradict the statute due to the agency's "specialized experience and broader investigations and information."<sup>90</sup>

When evaluating short dances like emotes, a court should not find a direct conflict between the definitions of "choreographic work" provided by the Copyright Office and the statute on its face since the statute itself fails to define what constitutes a "choreographic work." Thus, there can be no real conflict between the Copyright Office's opinion, laid out in its *Compendium* and circular, and the Copyright Act. If anything, the interpretations are only filling in gaps the legislature left in the statute. Given the lack of conflict and the Copyright Office's extensive experience with the subject matter, courts should afford deference to the Copyright Office's interpretations of the terms "social dance steps," "simple dance routines," and "choreography," with one small caveat: caution should be used in determining which short dances are too short.

The Copyright Office's notion that short dances are those "consisting of only a few movements or steps with minor linear or spatial variations" should always be carefully applied so as not to deny protection to dances that include more than a few "movements or steps."<sup>91</sup> For example, when determining whether musical compositions qualify for copyright protection, courts have held that although individual chords or notes cannot be copyrighted, compositions of even just four or seven chords may be granted such protection.<sup>92</sup> When applying the Copyright Office's interpretation of "choreographic works," courts should similarly look carefully at how many movements constitute "a few."

If courts adopt the Copyright Office's guidance and definitions of social dance steps and simple routines outlined above, short dances, such as those at issue in the *Fortnite* cases, would not have a remaining viable route to copyright protection. With the Copyright Office's definitions officially adopted by courts, the contested dances fit more neatly into the unprotected

88. See Bradley Lipton, *Accountability, Deference, and the Skidmore Doctrine*, 119 YALE L.J. 2096, 2099 (2010).

89. See *Morris*, 283 F.3d at 506.

90. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944).

91. See CIRCULAR 52, *supra* note 75, at 3.

92. See, e.g., *Swirsky v. Carey*, 376 F.3d 841, 852 (9th Cir. 2004) ("It cannot be said as a matter of law that seven notes is too short a length to garner copyright protection."); *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at \*18 (C.D. Cal. Oct. 30, 2014) (collecting cases and noting that copyright protection has not been categorically denied for progressions of just four or seven notes but noting that this was often in the context of originality determinations).

categories of “social dances” or “simple routines.” The Floss, for example, could be classified as either a social dance or a simple routine. The Copyright Office notes that social dances are “intended to be performed by members of the general public” and are “performed for the personal enjoyment of the dancers themselves.”<sup>93</sup> Although not as graceful as the “[b]allroom dances” noted in the circular,<sup>94</sup> the Floss is frequently performed by average people for no apparent purpose other than enjoyment. In fact, YouTube is full of videos of people performing the dance.<sup>95</sup> Additionally, because the Floss is made up of only one or two linear movements, it would also neatly fall into the unprotectable category of short or simple dances.<sup>96</sup> Therefore, whether labeled as either a simple routine or social dance, the Floss should not, as a legal matter, be entitled to copyright protection. For similar reasons, the Carlton and the Milly Rock would also likely be precluded from copyright protection.

#### D. *Policy Rationales for Denying Copyright Protection for Short Dance Moves*

By deferring to the Copyright Office’s interpretations of the “choreographic work” category, courts would not only provide much needed guidance, but would also bring the doctrine closer in line with some of copyright law’s main goals. Copyright law aims to “promote the Progress of Science and useful Arts”<sup>97</sup> by striking a delicate balance between providing protection to incentivize authors to create new works and allowing leeway so that new works can be created without being unduly strangled by the rights of preexisting works.<sup>98</sup> To strike this balance, copyright law does not protect the “building blocks of future works.”<sup>99</sup> Such “building blocks” include aspects of creative works that artists in the same field must use to express an idea; for example, words to create a book or a song, first position to choreograph a ballet, individual notes or basic chord progressions to create a musical

93. See COMPENDIUM, *supra* note 78, §§ 805.2(E), 805.5(B)(2).

94. See CIRCULAR 52, *supra* note 75, at 3.

95. See, e.g., Glob. News, *Ohio State Marching Band “Floss” During Halftime Performance*, YOUTUBE (Oct. 15, 2018), <https://www.youtube.com/watch?v=D0UitvVqzao> [<https://perma.cc/C5S3-BVRJ>]; LIVEKellyandRyan, *Live Sets the Guinness World Record for the Floss Dance*, YOUTUBE (Sep. 10, 2018), <https://www.youtube.com/watch?v=jcmmiuuKZhc> [<https://perma.cc/D9NU-WNQN>] (setting the world record for the most people performing the Floss at one time); Jonathan Norse, *Kid Does the Floss at the Royal Wedding*, YOUTUBE (May 19, 2018), <https://www.youtube.com/watch?v=uilBttONWPA> [<https://perma.cc/UV5V-LEYY>]; Ocinerwee1, *Adults Trying To Do the Floss*, YOUTUBE (May 28, 2018), <https://www.youtube.com/watch?v=Bj30tnbxebQ> [<https://perma.cc/TG5V-469T>]; Preston Park 2 Ret. Residence, *Senior Floss Dance*, FACEBOOK (Aug. 21, 2018), <https://www.facebook.com/watch/?v=926960864179565> [<https://perma.cc/F3TJ-QHBR>] (showing residents of a retirement home performing the Floss).

96. See CIRCULAR 52, *supra* note 75, at 3.

97. U.S. CONST. art. I, § 8, cl. 8.

98. See *Bridgeport Music, Inc. v. Dimension Films, LLC*, 230 F. Supp. 2d 830, 842 (M.D. Tenn. 2002), *rev’d*, 410 F.3d 792 (6th Cir. 2005).

99. *Id.*

composition,<sup>100</sup> and *scènes à faire* to tell a story.<sup>101</sup> If those basic elements were protected, it would be incredibly hard, if not impossible, for new artists to create original works without running into issues of copyright infringement. For example, if the third and fifth ballet positions could be copyrighted, choreographers would struggle to create dances because many jumping moves like *entrechat* or *pas de chat* involve starting and ending in those positions.<sup>102</sup>

The Copyright Office's interpretation of "simple routines" and "short dance moves" falls in line with how courts have previously interpreted building blocks in order to protect the broader copyright goal of promoting the progress of science and the useful arts. The Copyright Office's interpretation places works like the Carlton and the Floss on the same level as classic "building blocks" such as second position in ballet, and for good reason. Protecting such a short or simple routine effectively strikes a singular dance move from the world of choreography and places it in the hands of one person. This would be akin to someone being able to copyright a word, such as "goldfish," and thus having the power to sue anyone who uses it. Such a right would not promote progress but instead inhibit it by depriving other creators of useful tools. A dance that incorporates the Carlton as one of its moves, like the routine Ribeiro performed on the television show *Dancing with the Stars*,<sup>103</sup>

100. See *Johnson v. Gordon*, 409 F.3d 12, 23 (1st Cir. 2005) (noting that the "III, II [chord] harmonic progression" could not qualify for copyright protection since it was a "stereotypical building block of musical composition" that "lack[ed] originality"); *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGRx), 2014 WL 7877773, at \*18 (C.D. Cal. Oct. 30, 2014) ("Where music is concerned, fundamental building blocks, such as individual notes and chords, do not warrant copyright."); *Batiste v. Najm*, 28 F. Supp. 3d 595, 615 (E.D. La. 2014) ("[T]he basic harmonic and rhythmic building blocks of music, especially popular music, have long been treated by courts as well-worn, unoriginal elements that are not entitled to copyright protection. Moreover, the basic beats and chord progressions used in the plaintiff's songs are customary throughout the funk and R & B genres, making them unprotectable *scènes à faire* . . ."); Elizabeth A. Harris, *A Real-World Battle Over Dancing Avatars: Did Fortnite Steal the Floss?*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/arts/fortnite-floss-dance-lawsuits.html> [<https://perma.cc/HER5-MBKY> (dark archive)] (quoting copyright expert David Nimmer on the *Fortnite* lawsuits as saying, "Is there enough here to have a choreographic work, or are they just the basic building blocks, like words are the basic building blocks of poems, and nobody can own [them]" (internal quotation marks omitted)).

101. *Scènes à faire* include story elements like "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (citation omitted). These elements are not considered copyrightable. *Id.*

102. *Entrechat*, ENCYCLOPAEDIA BRITANNICA (Apr. 3, 2018), <https://www.britannica.com/art/entrechat#ref278699> [<https://perma.cc/4JGG-3WSA>]; *Learn Ballet: How To Do a Pas de Chat!*, BALLET PETITE (Nov. 24, 2014, 11:35 AM), <http://balletpetite.blogspot.com/2014/11/learn-ballet-how-to-do-pas-de-chat.html> [<https://perma.cc/5NV4-A6YG>].

103. See Eriq Gardner, *Copyright Office Refuses Registration for 'Fresh Prince' Star Alfonso Ribeiro's 'Carlton Dance'*, HOLLYWOOD REP. (Feb. 14, 2019), <https://www.hollywoodreporter.com/thresq/copyright-office-refuses-registration-fresh-prince-star-alfonso-ribeiros-carlton-dance-1186666> [<https://perma.cc/T8XL-U7XH>].



may be copyrightable because the short dance is part of a larger work that involves arrangement, coordination, and selection of many dance moves. The Carlton by itself, however, is just a building block, and thus denying it copyright protection furthers the goals of copyright law.

In the same vein, adopting the Copyright Office's interpretation of "social dances" can also further copyright law's policies and goals by limiting the risk of overprotecting certain works. Protecting social dances such as the Floss would grant too much protection to the copyright owner at the expense of the public, thus undoing the delicate balance copyright law seeks to create in order to promote artistic progress. As the Copyright Office's *Compendium* explains, "Performing a social dance is often a participatory, social experience."<sup>104</sup>

On the other hand, if courts decline to adopt the Copyright Office's interpretation and advice and find short dances to be copyrightable, that finding would constrain the expression and social participation of many individuals and consequently impose a substantial constraint without offering an equally substantial benefit. By allowing a short dance to garner protection—a not-too-far-fetched possibility since it arguably could be minimally creative<sup>105</sup>—courts would create an environment where "every individual who performed that dance in public would infringe the rights of the copyright owner."<sup>106</sup> Such a result would help no one, not even the plaintiffs bringing the claims. Thus, while it may initially seem counterintuitive to block a work from protection due to an interpretation by a rulemaking agency when it otherwise meets the requirements of originality and fixation, it is the best path for courts to take in order to bring the law in line with copyright law's acknowledged goals.

Adopting the definitions set out by the Copyright Office for "simple routines" and "social dances" and excluding short dances from copyright protection does not necessarily block short dances from any type of legal protection. In fact, denying copyright protection to short dances unearths another pathway to protection. This pathway, embodied in the right of publicity, may allow the creators of short dances and dance moves to find some limited form of protection that promotes progress without hindering social participation or independent creation. This is incredibly important since protection under the right of publicity presents few of the same policy concerns as copyright protection and may provide a safe harbor for artists of short dances in our bite-sized entertainment-driven culture.

104. COMPENDIUM, *supra* note 78, § 805.5(B)(2).

105. See *supra* note 64 and accompanying text.

106. COMPENDIUM, *supra* note 78, § 805.5(B)(2).

## III. THE RIGHT OF PUBLICITY: A BETTER PATH

If courts decide that short and repetitive dance moves are not copyrightable, it potentially opens an interesting, albeit admittedly convoluted, route to limited legal protection. If not protected by copyright, the “personas” or “likenesses” of the individual artists conveyed in these iconic dance moves might be protectable via state statutory or common law rights of publicity. The right of publicity thus opens an alternative pathway for legal protection without unduly undermining the goals intrinsic to copyright law. This pathway, however, is very narrow and will not be available to all artists wishing to protect their rights in short dances. This part will first discuss how the right of publicity could help some artists protect their rights in short dances and will then analyze how such a right would balance with First Amendment and public policy concerns.

A. *The Right of Publicity as Applied to Dance Moves*

The right of publicity acts as an odd intersection between intellectual property and privacy law. It is neither a sibling of copyright nor trademark law, but more of a distant cousin that seeks to protect the hard-to-define “likeness” or “persona” of a person instead of a particular work.<sup>107</sup> Unlike the federal protection of copyright law, right of publicity sounds in state law and therefore varies from state to state with some states not recognizing the right at all.<sup>108</sup> However, for the purposes of this Recent Development, I will focus on California’s right of publicity laws since California has extensive experience with the right, and many of the *Fortnite* cases pleaded the right of publicity under California statute or common law.<sup>109</sup>

California recognizes the right of publicity by both statute and common law.<sup>110</sup> Put simply, the right of publicity protects “an individual’s proprietary

107. See 1 MCCARTHY & SCHECHTER, *supra* note 15, § 1.3.

108. See *id.* §§ 6:2, 6:4 (providing an overview of state statutory and common law right of publicity protections).

109. Notably, many of the *Fortnite* plaintiffs filed suit in the Central District of California. See sources cited *supra* note 11. However, as Epic Games argued, if these cases ever went to trial, the court would have to deal with the question of whether California right of publicity laws actually apply. Memorandum of Points and Authorities in Support of Defendant’s Motion to Dismiss for Failure to State a Claim and Special Motion to Strike (Anti-SLAPP) Plaintiffs’ Complaint at 17–18, Redd *ex rel.* Horning v. Epic Games, Inc., No. 2:18-cv-10444-R(MAAx) (C.D. Cal. Dec. 17, 2018). In the case of Backpack Kid, who is not a California resident, Epic Games argued that Georgia’s right of publicity laws, not California’s, should apply. *Id.*

110. White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397–99 (9th Cir. 1992) (discussing both a statutory and common law right of publicity); see J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 136 (1995).

interest in his own identity.”<sup>111</sup> The right of publicity statute in California states:

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner . . . or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>112</sup>

In order to succeed on a common law right of publicity claim, a 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.”<sup>113</sup> Notably, “[t]he right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable.”<sup>114</sup> Therefore, if these dances constitute recognizable likenesses or personas of the plaintiffs, they might find some recourse under this statutory and common law right. However, before this right can be applied, the likeness in question must pass certain procedural hurdles.

Interestingly, this opportunity for protection may only be open to the plaintiffs if the court finds that the dance moves in question are not protectable subject matter under the federal copyright doctrine.<sup>115</sup> Before a likeness can receive protection under the right of publicity doctrine, a court must ensure that federal copyright law has not preempted such protection.<sup>116</sup> To make this determination, courts look to “whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103” and, if it does, “whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106.”<sup>117</sup>

Generally, federal copyright law does not preempt the state law right of publicity because they seek to protect different things.<sup>118</sup> The right of publicity typically focuses on protecting a person’s rights in their own identity—a right not encompassed by the eight enumerated subject matters of copyright

111. *White*, 971 F.2d at 1403 (internal quotation marks omitted) (quoting *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 (9th Cir. 1974)).

112. CAL. CIV. CODE § 3344(a) (West 2016).

113. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983).

114. *White*, 971 F.2d at 1398.

115. This is based on the notion that the plaintiffs in these cases are trying to protect the dances, not just their likenesses in the dances.

116. See *No Doubt v. Activision Publ’g, Inc.*, 702 F. Supp. 2d 1139, 1144 (C.D. Cal. 2010).

117. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137–38 (9th Cir. 2006) (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003 (9th Cir. 2001)).

118. 2 J. THOMAS MCCARTHY & ROGER E. SCHECHTER, RIGHTS OF PUBLICITY AND PRIVACY § 11:50 (2d ed.), Westlaw (database updated Apr. 2019).

protection.<sup>119</sup> However, in this instance, the *Fortnite* plaintiffs appear to be arguing that the short dance moves themselves constitute their very likenesses or invoke their identities.<sup>120</sup> Indeed, given that the emotes do not bear the images or names of the plaintiffs and are performed by digital avatars within the context of a video game, it is difficult to see what, besides the dance moves themselves, could invoke the plaintiffs' personas. The plaintiffs thus arguably seek to control the reproduction of the dances themselves, which would be the precise subject matter of any copyright claim. Given this, it is conceivable that, if the dances were copyrightable, the plaintiffs' right of publicity claims could be seen as subsumed by the federal copyright claims.

However, if in accordance with the Copyright Office's guidance, courts rule that the short dance moves do not constitute choreographic works under 17 U.S.C. § 102, then the preemption inquiry is halted at step one. Because "federal law preempts state-law right of publicity claims where the claims are based on the claimant's *copyrightable* activities,"<sup>121</sup> short dances cannot be preempted since they are not copyrightable as choreographic works. Thus, by definitively adopting the interpretation of "social dances" and "simple routines" delineated in the Copyright Office's circular and *Compendium*, the courts would firmly place short and simple dance routines, such as the Carlton or the Floss, outside the bounds of copyright law. Drawing this legal line in the sand actually helps the plight of the emerging bite-sized entertainment industry since it opens a door that offers more fitting protection to these artists than would have been available under copyright—the right of publicity.

Here, there is some uncertainty as to whether short dances, such as those at issue in the *Fortnite* cases, can fairly be said to constitute part of the likenesses of the plaintiffs. The *Fortnite* plaintiffs essentially would have to claim that the short dances are linked to them to such a degree that the dances themselves are part of their identities.<sup>122</sup> Under the California right of publicity statute, the *Fortnite* dances would likely not fall within the protected aspects of identity and persona. The statute expressly protects "name, voice,

119. See *id.*; see also *Brown v. Ames*, 201 F.3d 654, 658 (5th Cir. 2000) ("In other words, the tort of misappropriation of name or likeness protects a person's *persona*. A *persona* does not fall within the subject matter of copyright—it does not consist of 'a "writing" of an "author" within the meaning of the Copyright Clause of the Constitution.' (citation omitted)); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462–63 (9th Cir. 1988) (noting that federal copyright law did not preempt the state law right of publicity claim in the unauthorized use of a Midler sound alike and also explaining that a "voice is as distinctive and personal as a face").

120. See, e.g., *Ribeiro Complaint*, *supra* note 11, at 15–17.

121. *No Doubt*, 702 F. Supp. 2d at 1144.

122. This is arguably something their complaints have, in fact, done, since they do not allege another way the emotes appropriate their likenesses. See *Redd Complaint*, *supra* note 11, at 15–18; *Ribeiro Complaint*, *supra* note 11, at 15–17; *Ferguson Complaint*, *supra* note 11, at 14–17 (listing the plaintiff's explanation of how his "likeness" was appropriated).

signature, photograph, or likeness”<sup>123</sup> and the only aspect under which the *Fortnite* dances could be conceivably protected is likeness. However, the statutory definition of “likeness” has been construed rather narrowly.<sup>124</sup> In *White v. Samsung Electronics America, Inc.*,<sup>125</sup> the Ninth Circuit explained that a robotic version of Vanna White did not qualify for statutory protection because, under the California statute, “likeness” signifies a visual image or similarity.<sup>126</sup> Following this logic, some courts have found that video game avatars that are “identifiable only by using contextual information apart from the image” cannot constitute a likeness under the statute.<sup>127</sup> Because the emotes at issue in the *Fortnite* cases mimic only the artists’ dance moves and not their visual images, voices, or names, it may be difficult for the *Fortnite* plaintiffs to allege that the emotes constitute their likenesses under the statute.

Fortunately, the California *common law* right of publicity might present a friendlier path. Unlike the statutory interpretation of likeness, common law has frequently interpreted the concept of likeness broadly.<sup>128</sup> Common law likeness has been held to include a wide variety of things such as look-a-like robots,<sup>129</sup> the use of a distinctly decorated race car,<sup>130</sup> or even the impersonation of a “distinctive” voice.<sup>131</sup> The definition of likeness within the common law does not nitpick on particular types of expression but instead focuses on the term “identity.”<sup>132</sup> Given this focus on identity, McCarthy and Schechter explain that the traditional phrase “name and likeness” used to describe the right of publicity may be too narrow, and suggest instead the term “persona.”<sup>133</sup> One’s persona may be any attribute that can clearly identify the plaintiff and can include “a unique vocal style, body movement, costume, makeup or distinguishing setting,” which alone or in combination can serve to

123. CAL. CIV. CODE § 3344(a) (West 2016).

124. See *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (stating that the term “‘likeness’ refers to a visual image” (internal quotation marks omitted) (*Midler*, 849 F.2d at 463); 1 MCCARTHY & SCHECHTER, *supra* note 15, § 6:33.

125. 971 F.2d 1395 (9th Cir. 1992).

126. *Id.* at 1397.

127. 1 MCCARTHY & SCHECHTER, *supra* note 15, § 6:33; see also *Davis v. Elec. Arts Inc.*, No. 10-cv-03328-RS, 2017 WL 3335758, at \*3 (N.D. Cal. Aug. 4, 2017).

128. See *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 413–14 (9th Cir. 1996); *California Right of Publicity Law*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/california-right-publicity-law> [https://perma.cc/DFH9-QCMS].

129. *White*, 971 F.2d at 1399.

130. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974).

131. 1 MCCARTHY & SCHECHTER, *supra* note 15, § 4:78 (citing *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)).

132. See *Abdul-Jabbar*, 85 F.3d at 413–14.

133. 1 MCCARTHY & SCHECHTER, *supra* note 15, § 4:46 (internal quotation marks omitted).

identify the plaintiff.<sup>134</sup> Short dances, like those claimed by the *Fortnite* plaintiffs, could conceivably be construed as unique “body movements” and qualify as a potential aspect of an artist’s persona.

This idea is not entirely unfounded. In *White*, for example, the pose or movement of Vanna White turning the letters was found to be an identifying feature.<sup>135</sup> However, the *White* court did not find the pose alone sufficient to invoke Vanna White’s persona; instead, the court’s decision rested on the commercial’s use of the pose in combination with the gown, blonde wig, and Wheel of Fortune set.<sup>136</sup> By contrast, the *Fortnite* plaintiffs must rely more heavily on the identifiability of their personas in the short dances alone. Because the use of the emotes by Epic Games does not incorporate any other identifying features of the plaintiffs, the short dances themselves bear the entire burden of invoking the plaintiffs’ personas.

When attempting to determine whether the use in question constitutes a persona, “identifiability of the image or other aspect of the plaintiff is an essential element of a claim.”<sup>137</sup> There is no single test to determine whether a use is quintessentially identifiable; however, one test recommended by a number of scholars “requires the plaintiff to demonstrate that his or her image is identifiable in the defendant’s use by more than a de minimis number of people.”<sup>138</sup> Applying these broad definitions of persona and identifiability to the facts at issue in the *Fortnite* cases would likely lead to varying results.

The specific features of each dance in the *Fortnite* cases would need to be examined separately to determine if each dance qualifies as a persona of the artist since each raises separate and distinct issues. However, if the definition

134. *Id.*; see also *White*, 971 F.2d at 1398 (“The right of publicity does not require that appropriations of identity be accomplished through particular means to be actionable.”).

135. *White*, 971 F.2d at 1399.

136. See *id.* (stating that “[v]iewed separately, the individual aspects of the advertisement in the present case say little”). The *White* court also gives a hypothetical example involving an advertisement run during a professional basketball game involving a “robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out.” *Id.* The court reasons that while this pose alone proves little in the way of identity, when combined with other factors, such as a red basketball uniform, the number twenty-three, and black high-top Air Jordan sneakers, the robot is then identifiable as Michael Jordan. *Id.*

137. James J. S. Holmes & Kanika D. Corley, *Defining Liability for Likeness of Athlete Avatars in Video Games*, L.A. LAW., May 2011, at 17, 18; see also *White*, 971 F.2d at 1398 (“It is not important how the defendant has appropriated the plaintiff’s identity, but whether the defendant has done so. *Motschenbacher*, *Midler*, and *Carson* teach the impossibility of treating the right of publicity as guarding only against a laundry list of specific means of appropriating identity. A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth.”).

138. See Holmes & Corley, *supra* note 137, at 18; see also 1 MCCARTHY & SCHECHTER, *supra* note 15, § 3:10 (“To establish liability, we think plaintiff need prove no more than that he or she is reasonably identifiable in defendant’s use to more than a de minimis number of persons.”).

of “likeness” or “persona” is truly focused on identifiability, then many of the plaintiffs have colorable claims. The Milly Rock, for example, was popularized and named after Terrence Ferguson.<sup>139</sup> The Milly Rock dance is closely associated with 2 Milly (as shown by the fact that it is literally named after him) and is nearly identical to the “Swipe It” emote available for sale in *Fortnite*.<sup>140</sup> This dance arguably constitutes 2 Milly’s likeness or persona under the loose “identifiability test” as more than a de minimis number of people would recognize the dance and, by association, the movement as the Milly Rock and as an extension of 2 Milly himself. The “identifiability” of the dance as the persona or likeness of 2 Milly is supported by the fact that many *Fortnite* players and 2 Milly fans identified the Swipe It emote as the Milly Rock and brought the issue to the attention of 2 Milly wondering if he was connected with the use.<sup>141</sup>

As another example, the Carlton dance embodied in the Fresh emote raises many of the same issues. Similar to the analysis above, Ribeiro’s likeness or persona as embodied in the Fresh emote was identifiable by fans and players of the game.<sup>142</sup> Additionally, aspects of one’s persona can be combined to achieve identifiability<sup>143</sup> and “contextual information” in the context of video game avatars may be used to support a California common law right of publicity claim.<sup>144</sup> The argument that Ribeiro’s persona is embodied in the Fresh emote is therefore potentially strengthened by contextual information in the game itself—the name of the allegedly infringing emote, Fresh, is a reference to the show on which Ribeiro first performed the Carlton, *The Fresh Prince of Bel-Air*.<sup>145</sup>

However, unlike the Milly Rock, which incorporates the name of 2 Milly, the Carlton does not name Ribeiro but instead names the character he played in a famous sitcom. This difference exemplifies why the right of publicity is a better route for protecting artists’ rights in short dances than copyright law. While the question of who owns the right to the character Carlton would present a large issue for copyright purposes,<sup>146</sup> it does not

139. Snyder, *supra* note 9.

140. *Id.*

141. See Insider, *Fortnite and the Milly Rock Debate: Can You Copyright a Dance Move?*, YOUTUBE (Oct. 2, 2018), <https://www.youtube.com/watch?v=uwv1KHf1HVU> [<https://perma.cc/N7GS-QYRZ>].

142. See Austen Goslin, *Fresh Prince’s Alfonso Ribeiro Suing Epic Games Over Fortnite Carlton Dance Use*, POLYGON (Dec. 27, 2018), <https://www.polygon.com/fortnite/2018/12/17/18145166/fortnite-carlton-dance-lawsuit-alfonso-ribeiro> [<https://perma.cc/ZMY8-DCGZ>] [hereinafter Goslin, *Ribeiro Suing Epic Games*].

143. 1 MCCARTHY & SCHECHTER, *supra* note 15, § 4:46.

144. See Davis v. Elec. Arts Inc., No. 10-cv-03328-RS, 2017 WL 3335758, at \*3 (N.D. Cal. Aug. 4, 2017); 1 MCCARTHY & SCHECHTER, *supra* note 15, § 6:33 n.9.

145. See Goslin, *Ribeiro Suing Epic Games*, *supra* note 142.

146. For instance, because Ribeiro performed the dance for the first time on the show *The Fresh Prince of Bel-Air*, or even later on *Dancing with the Stars*, a question may exist as to whether Ribeiro

create quite the same obstacles under a right of publicity claim. For publicity purposes, an actor who plays a role “created by another so distinctively and uniquely that the particular characterization is indelibly linked with that actor” can have rights arising out of his likeness in that persona.<sup>147</sup> This phenomenon occurs when the actor has become so “inextricably identified” with the character that the actor’s own identity is invoked by a commercial use that identifies the character.<sup>148</sup> This is potentially the case with Ribeiro and the Carlton dance. Ribeiro is the only actor associated with the character Carlton.<sup>149</sup> Although Ribeiro’s identity may not be closely tied to the actual character of Carlton, it is arguably bound to the dance move bearing the character’s name. The Carlton is arguably “inextricably identified” with Ribeiro’s personal portrayal of the character to such a degree that it has become an identifying feature of the actor himself. Ribeiro has performed the Carlton publicly for many years despite the fact that the show was cancelled over a decade ago. For instance, since the show’s end, Ribeiro has performed the dance on shows such as *The Graham Norton Show*,<sup>150</sup> *Dancing with the Stars*,<sup>151</sup> *TMZ*,<sup>152</sup> and many others.<sup>153</sup> Given the strong association between Ribeiro and the Carlton, the right of publicity appears to be the perfect avenue to make his case against *Fortnite*’s use of his likeness for commercial gain.<sup>154</sup>

By contrast, Backpack Kid might have a harder time proving that the Floss is a unique aspect of his persona by which more than a de minimis

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owns the copyright in the dance or whether the copyright belongs to one of the television studios under a “work made for hire” theory. See 17 U.S.C. § 101 (2018) (defining “work made for hire” as “(1) a work prepared by an employee within the scope of his or her employment,” or “(2) a work specially ordered or commissioned for use as a contribution” to, for instance, an “audiovisual work”).

147. 1 MCCARTHY & SCHECHTER, *supra* note 15, § 4:70.

148. *Id.* § 4:70 n.2 (internal quotation marks omitted) (quoting *McFarland v. Miller*, 14 F.3d 912, 920 (3d Cir. 1994)).

149. See Goslin, *Ribeiro Suing Epic Games*, *supra* note 142.

150. The Graham Norton Show, *Will Smith, Alfonso Ribeiro and DJ Jazzy Jeff Perform the Carlton Dance—The Graham Norton Show*, YOUTUBE (Mar. 3, 2015), [https://www.youtube.com/watch?v=db2iKqe7Q\\_A](https://www.youtube.com/watch?v=db2iKqe7Q_A) [<https://perma.cc/V79Z-ZRW7>].

151. HopMedia, *supra* note 63.

152. TMZ, ‘Carlton Dance’ Flash Mob!!!—Alfonso Ribeiro Leads, YOUTUBE (Apr. 23, 2012), <https://www.youtube.com/watch?v=HXSb9BDenjk> [<https://perma.cc/E9JM-HDTE>].

153. See, e.g., I’m A Celebrity . . . Get Me Out of Here!, *Alfonso Ribeiro Teaches Us How To Do the Carlton Dance*, YOUTUBE (Oct. 8, 2014), <https://www.youtube.com/watch?v=T5gYTxGRkys> [<https://perma.cc/XT7B-7ADR>]; PhilanthroPwn, *supra* note 7; Steve TV Show, *Alfonso Ribeiro Is Asked To Do the “Carlton Dance” Everyday*, YOUTUBE (Dec. 4, 2017), <https://www.youtube.com/watch?v=bdwM18J7TZE> [<https://perma.cc/85Y7-TPCN>] (showing Ribeiro explaining that he is asked to do the Carlton every day of his life and then performing the Carlton).

154. This is not to say, however, that Ribeiro or 2 Milly should or ought to win their lawsuits. Instead, I am merely arguing that this is the correct legal avenue through which to bring the claims. There could still be further legal issues or defenses such as transformative use that could hinder the plaintiffs’ abilities to win their cases. See *infra* Section III.B.



number of people could recognize him and only him. Unlike the Carlton or the Milly Rock, the Floss does not bear any variation of Backpack Kid's name nor is he the only person with whom the dance is associated. Although Backpack Kid is widely credited with creating the dance move's viral fame<sup>155</sup> and many people directly link him to the dance,<sup>156</sup> many other individuals have adopted the move. Perhaps because of the viral nature of the dance, it spread quickly and became an internet sensation that has appeared in TV shows, movies, and memes.<sup>157</sup> In the famous *White* decision, the Ninth Circuit found that certain aspects of the Vanna White robot, such as her blonde hair, dress, and jewelry, were too common to uniquely identify Vanna White and held that it was only the combination of those elements with her exact pose and the Wheel of Fortune game set that lent her recognizability.<sup>158</sup> While the Floss may be as closely associated with Backpack Kid as the specific pose used in the advertisement was with Vanna White, no additional factors lend Backpack Kid recognizability. The avatars performing the Floss are not designed to mimic Backpack Kid's aesthetic style, such as including his signature backpack, nor do the avatars perform the dance in a setting that would lead an average viewer to think of him specifically, as the Wheel of Fortune game board did for Vanna White. However, if Backpack Kid could prove that the dance is strongly associated with his persona and is a part of his identity in a way that people could instantly recognize, even without additional identifying information, then he might have a right of publicity claim for the Floss.

#### B. *Preserving a Delicate Balance*

Certain limitations to the right of publicity make it a better avenue for potential protection of short dances than copyright law. These limitations include both the requirement for some type of gain on the part of the unauthorized user<sup>159</sup>—usually of a commercial nature—and the strong First

155. *Backpack Kid: Teen Behind 'Flossing' Dance Craze To Sue Fortnite Creators*, GUARDIAN (Dec. 19, 2018), <https://www.theguardian.com/games/2018/dec/19/teenager-behind-flossing-dance-craze-the-latest-to-sue-fortnite-creators> [https://perma.cc/UT9E-XR9W].

156. See Abby Haglage, *Every Kid Is Doing a Dance Called 'the Floss'—Here's the 16 Year Old Who Invented It*, YAHOO FIN. (May 29, 2018), <https://finance.yahoo.com/news/every-kid-dance-called-floss-heres-16-year-old-invented-225342533.html> [https://perma.cc/QX85-JEF7].

157. See Paddy Maddison, *What Is 'the Floss' and Where Did It Come From?*, LADBIBLE (Apr. 14, 2018), <https://www.ladbible.com/entertainment/celebrity-what-is-the-floss-and-where-did-it-come-from-20180413> [https://perma.cc/78D8-WM5G] (noting that many people have since taken to performing the Floss).

158. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).

159. See *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983); 1 MCCARTHY & SCHECHTER, *supra* note 15, § 6:25.

Amendment protections against which the right of publicity must be balanced.<sup>160</sup>

Unlike copyright law, the right of publicity provides more limited protection, which may still promote progress while not tipping the balance of the scales too far away from artists' rights. Building blocks such as the Carlton, though perhaps not eligible for the more stringent copyright protection due to policy concerns, do deserve some measure of protection and the right of publicity provides the correct amount. For plaintiffs to claim the right, the disputed use of the short dances would need to be "for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services"<sup>161</sup> or more generally used to the defendant's advantage for a (usually) commercial benefit.<sup>162</sup> Although this requirement does not eliminate all threats to public interests created by right of publicity protections,<sup>163</sup> it does lessen the burden because someone performing the dance publicly for noncommercial purposes is unlikely to risk liability. For example, friends out for a night at the club who dance the Floss would face no liability since they would not profit from the use. Therefore, the threat posed to the public interest by right of publicity is less than that of a copyright claim.

Moreover, the right of publicity is balanced against strong First Amendment protections when artistic expression or protected speech is involved.<sup>164</sup> Importantly for the *Fortnite* cases, video games have been held to qualify as expressive speech and thus trigger First Amendment protections.<sup>165</sup> In order to balance the right of artists over their personas against the First Amendment protection of freedom of speech, California courts employ a "transformative use test."<sup>166</sup> This test asks whether the plaintiff's persona or identity has been sufficiently "transformed" by the secondary user, a question that has been categorized by the Ninth Circuit as a question of fact.<sup>167</sup> As

160. See 1 MCCARTHY & SCHECHTER, *supra* note 15, § 6:25.

161. CAL. CIV. CODE § 3344(a) (West 2016).

162. See *Eastwood*, 198 Cal. Rptr. at 347.

163. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 374 (Mo. 2003) (finding that the use of a hockey player's name in a fictionalized comic book was "predominantly a ploy to sell comic books and related products rather than an artistic or literary expression" and that "under these circumstances, free speech must give way to the right of publicity").

164. See 1 MCCARTHY & SCHECHTER, *supra* note 15, § 6:25.

165. See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) ("Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.").

166. See *Hilton v. Hallmark Cards*, 599 F.3d 894, 909 (9th Cir. 2010) ("This 'transformative use' defense poses 'what is essentially a balancing test between the First Amendment and the right of publicity.'" (quoting *Winter v. DC Comics*, 69 P.3d 473, 475 (Cal. 2003))); 1 MCCARTHY & SCHECHTER, *supra* note 15, § 6:25.

167. *Hilton*, 599 F.3d at 909–10; 2 MCCARTHY & SCHECHTER, *supra* note 118, § 8:72.

McCarthy and Schechter have explained, the transformative use test is “extremely difficult to predict and apply.”<sup>168</sup>

Because this inquiry is fact dependent, it is hard to say whether or not the *Fortnite* dances would overcome the transformative use test. Their success would largely depend on whether the use by Epic Games sufficiently transforms the dances<sup>169</sup> and whether their personas, embodied in their respective short dances, constitute the “very sum and substance” of the emotes in question or are merely the “raw material” from which the emotes, as original works, were “synthesized.”<sup>170</sup> Because the emotes are sold sometimes separately from the game at large,<sup>171</sup> the plaintiffs in the *Fortnite* cases may have a shot at overcoming the First Amendment defense if their personas, as embodied in the dances, are considered the “sum and substance” of the emotes and no transformative or creative elements are found in the emote that alter the dances. Given that the short dances are performed by video game avatars within the video game itself, however, the *Fortnite* plaintiffs would likely face an uphill battle.

The ability of short dances to overcome a First Amendment defense under the right of publicity will differ based on the context of the unauthorized use. As the Ninth Circuit has explained, “speech which either appropriates the economic value of a performance or persona or seeks to capitalize off a celebrity’s image in commercial advertisements is unprotected by the First Amendment against a California right-of-publicity claim.”<sup>172</sup> Thus, short dances used outside the context of video games, such as those used in a commercial for nonexpressive works or on a product, may also have a better chance of overcoming this barrier since such uses warrant lesser protection.

Although the right of publicity does not provide a perfect path to protection for short dances due to the complexity of the doctrine, strong First Amendment protections, and the inconsistency of the doctrine from state to state, it does provide a *potential* path for at least some short dances closely connected with the identity of a singular artist. As shorter forms of

168. 2 MCCARTHY & SCHECHTER, *supra* note 118, § 8:72.

169. See *Winter v. DC Comics*, 69 P.3d 473, 478–79 (Cal. 2003) (“We then summarized the rule. ‘In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as [an] affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame.’” (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (2001))).

170. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (2001).

171. See Nick Statt, *Fortnite Keeps Stealing Dances—and No One Knows if It’s Illegal*, VERGE (Dec. 20, 2018), <https://www.theverge.com/2018/12/20/18149869/fortnite-dance-emote-lawsuit-milly-rock-floss-carlton> [<https://perma.cc/Z4CU-EFZD>].

172. *Sarver v. Chartier*, 813 F.3d 891, 905 (9th Cir. 2016).

entertainment become the norm, any potential route to legal protection for short forms of entertainment will be important.

#### CONCLUSION

With our goldfish-like attention spans, addiction to transitory fads, and need for bite-sized entertainment, questions concerning how to protect short forms of entertainment, like viral dance moves, are likely to be a growing concern. Studies have indicated that our short attention spans have begun to alter the way entertainment, news, and advertisements are viewed and digested.<sup>173</sup> Given the growing emphasis on short, seconds-long entertainment content, the need to identify a potential route to legal protection for creators of short dances is becoming more pressing. Due to the current state of the law and broad rights afforded to copyright holders, copyright law is not the best way to protect short dances. Instead, artists whose identities are closely intertwined with short dances or movements should seek protection under the right of publicity. Although the right of publicity does not provide an easy path to protection, it does offer some opportunity for artists to protect their work and identity in the fast-paced digital era. The narrower rights afforded by the right of publicity preserve the balance between artists' rights over their own personas and signature movements and the public's right to free speech in a way that copyright law cannot. The right of publicity may act as an important beacon for artists wishing to protect their rights in short dances or other creative endeavors and pave a better, and more balanced, path for artists to protect themselves in our rapidly moving culture.

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173. Bedrina, *supra* note 3; Fishman, *supra* note 3.

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