

3-1-2019

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### Recommended Citation

Alex Avakiantz, Comments, *Stealing Swagger: NFL End Zone Celebrations and Fortnite's Fortune*, 94 Wash. L. Rev. 453 (2019).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol94/iss1/10>

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## STEALING SWAGGER: NFL END ZONE CELEBRATIONS AND FORTNITE'S FORTUNE

Alex Avakiantz\*

*Abstract:* Football is a staple in many American households: each week, millions watch the game. Every year, National Football League athletes benefit by taking advantage of this passion, not only by earning millions of dollars in salary, but also by signing lucrative endorsement deals. While success on the field is a starting point, an athlete with a captivating personality stands to gain even more financially. A unique end zone celebration that captures fans' hearts contributes to that personality and makes the player more marketable.

In 2017, after announcing plans to relax the rules against end zone celebrations, the National Football League saw a rise in such celebrations. That same year, a video game called Fortnite exploded onto the scene. Fans were particularly interested in the dances they could make their video game characters perform—dances originally created and performed by pop culture icons.

Because copyright law presumes authors need a financial incentive to create, copyright law protects expressive works, including choreography. However, recent guidance from the U.S. Copyright Office denies protection to end zone celebrations. This Comment largely concurs: Given copyright's requirements, most celebrations are too simple and therefore will not, and should not, receive protection. Nevertheless, more complex celebrations are arguably copyrightable. If Fortnite has already copied the choreography of others and profited handsomely, there is no reason why end zone celebrations could not be its next target. The Copyright Office opened the door to this kind of commercial appropriation, and now it is time to shut it.

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## INTRODUCTION

Over the past decade, the National Football League (the NFL or the League) earned its new moniker: “No Fun League.”<sup>1</sup> Indeed, it routinely penalized players for celebrating touchdowns.<sup>2</sup> In 2016 alone, the NFL fined many players for dancing, including Antonio Brown \$9,115 for twerking, Vernon Davis \$12,154 for tossing a football through the goalpost like a basketball, and Marquette King \$12,154 for doing a dance.<sup>3</sup>

In 2017, however, the NFL relaxed its rules on end zone celebrations.<sup>4</sup> It now even allows group demonstrations—which referees previously penalized—and allows players to celebrate on the ground using the football as a prop.<sup>5</sup> Players took advantage of the relatively lax rules during the 2017 season with popular demonstrations in the end zone.<sup>6</sup> Given the possibility that others may financially exploit such demonstrations, players should be able to protect the more complex and unique end zone celebrations.

2017 was also the year Epic Games released the massively popular third-person shooter<sup>7</sup> video game Fortnite.<sup>8</sup> While Fortnite is free to play, players can choose to spend money to purchase in-game items, including

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1. See Mark Maske, *The NFL Never Wanted to Be the No Fun League. It Just Happened that Way—Until Now*, WASH. POST (July 20, 2017), [https://www.washingtonpost.com/news/sports/wp/2017/07/20/the-nfl-never-wanted-to-be-the-no-fun-league-it-just-happened-that-way-until-now/?utm\\_term=.b208cfd76505](https://www.washingtonpost.com/news/sports/wp/2017/07/20/the-nfl-never-wanted-to-be-the-no-fun-league-it-just-happened-that-way-until-now/?utm_term=.b208cfd76505) [https://perma.cc/55TF-6PUC].

2. *Id.*

3. Ryan Bort, *Every NFL Celebration that Has Drawn a Fine in 2016*, NEWSWEEK (Dec. 14, 2016, 1:14 PM), <http://www.newsweek.com/nfl-reviewing-touchdown-celebration-penalties-531409> [https://perma.cc/FD2Y-PL57].

4. Kevin Patra, *NFL Relaxing Touchdown Celebration Rules for Players*, NFL (May 23, 2017, 1:10 PM), <http://www.nfl.com/news/story/0ap3000000810537/article/nfl-relaxing-touchdown-celebration-rules-for-players> [https://perma.cc/E9GZ-JHZV].

5. *Id.*

6. Charles Curtis, *Best NFL Touchdown Celebrations of 2017, Ranked*, USA TODAY (Dec. 26, 2017, 1:43 PM), <https://www.usatoday.com/story/sports/ftw/2017/12/26/the-36-best-nfl-touchdown-celebrations-of-2017-ranked/108927178/> [https://perma.cc/FE2Z-N8GH].

7. As opposed to a first-person shooter game, where the gamer sees what the character would see from their perspective (namely the weapon they hold and whatever is directly in front of them), a third-person shooter game allows the gamer to see the character’s entire body maneuvering through the game.

8. Sarah LeBoeuf, *What is ‘Fortnite’?: A Look at the Video Game that has Become a Phenomenon*, NBC NEWS (June 30, 2018, 8:27 AM), <https://www.nbcnews.com/tech/tech-news/what-fortnite-look-video-game-has-become-phenomenon-n887706> [https://perma.cc/T44S-Y9WC].

dances.<sup>9</sup> Some of these dances, such as the “Carlton Dance,”<sup>10</sup> are not original to Fortnite, but rather are digital renderings of dances recognized in popular culture.<sup>11</sup>

The current copyright statute, which covers such dances, is the Copyright Act of 1976.<sup>12</sup> The Copyright Act protects authors’ expressive works including books, songs, films, and choreography.<sup>13</sup> It does so by conferring several exclusive rights on authors, such as the right to reproduce, distribute, and perform their copyrighted work.<sup>14</sup> Congress intended these protections to incentivize authors to create works of art to offer to society.<sup>15</sup>

An author seeking copyright protection must establish that the work satisfies each criterion of being original, is a “work of authorship,” and is “fixed in a tangible medium of expression.”<sup>16</sup> An author must also survive copyright’s typical doctrinal obstacles: idea/expression,<sup>17</sup> merger,<sup>18</sup> scènes à faire,<sup>19</sup> and functionality.<sup>20</sup> Some works will involve multiple authors<sup>21</sup> and hence complicate the analysis. Equally challenging is the “work made for hire” doctrine,<sup>22</sup> through which copyrightable works end up belonging to an employer rather than an employee-author. Additionally, even if an author successfully achieves copyright protection, infringers can invoke a fair use defense.<sup>23</sup> If an infringer can show fair use, the infringer can then continue using the copyrighted material.

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9. *Id.*

10. Molly Wood, *Some Performers Say “Fortnite” Is Stealing Their Dances and Should Share the Wealth*, MARKETPLACE (Oct. 2, 2018, 5:38 AM), <https://www.marketplace.org/2018/10/01/tech/some-performers-say-fortnite-stealing-their-dances-and-should-share-wealth> [<https://perma.cc/9LGW-5Y28>]. The “Carlton Dance” was made famous by actor Alfonso Ribeiro in the television series “The Fresh Prince of Bel-Air.” See CBS This Morning, *Alfonso Ribeiro Sues Fortnite Maker for Using “Carlton Dance,”* YOUTUBE (Dec. 18, 2018), <https://www.youtube.com/watch?v=rFLQqFZpebo> [<https://perma.cc/X6FF-UJBZ>].

11. For example, rapper 2 Milly claims Fortnite ripped off his “Milly Rock” dance. See Wood, *supra* note 10.

12. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17, 18, and 44 U.S.C.).

13. See 17 U.S.C. § 102(a) (2018).

14. *Id.* § 106.

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

16. 17 U.S.C. § 102(a).

17. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

18. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967).

19. *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1374 (10th Cir. 1997).

20. *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1038 (9th Cir. 2015).

21. 17 U.S.C. § 101.

22. *Id.* § 201(b).

23. See *id.* § 107.

Though end zone celebrations also raise trademark and right of publicity issues,<sup>24</sup> this Comment focuses only on copyright law. In the case of end zone celebrations, the thresholds of copyrightability are by and large not met, mostly due to the celebrations' relative simplicity. In fact, the U.S. Copyright Office confirmed this notion, stating 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>25</sup> Further, "[e]xamples of commonplace movements or gestures that do not qualify for registration as choreographic works or pantomimes include . . . [a] celebratory end zone dance move or athletic victory gesture."<sup>26</sup> However, some celebrations—which use more than a "few movements"—meet copyright law's thresholds and should not be categorically excluded. This is especially important given the endorsement deals at stake. To preserve monetary incentives, copyright should protect such celebrations.

This Comment provides the relevant background of end zone celebrations, Fortnite, and copyright law, before applying the law to the celebrations. Part I provides information about end zone celebrations in the NFL and discusses the potential market for the personas of players who perform them. Part II examines the video game Fortnite and considers how end zone celebrations might be a target for game creators. Part III discusses the basic thresholds of copyright protection: originality, "work of authorship," and fixation in a tangible medium of expression. It also discusses the various remedies copyright law provides. Part IV examines typical obstacles to copyrightability, which are related to the basic thresholds. Part V analyzes fair use as a defense to copyright infringement. Part VI focuses on the case law—and lack of case law—of choreography copyrightability. Finally, Part VII applies copyright law to end zone celebrations and argues for the necessity of protecting complex celebrations, the Copyright Office's guidance notwithstanding.

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24. The celebrations could be thought of as a trademark signaling the underlying source, the player; infringement would be analyzed via the traditional "likelihood of confusion" test. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979); *see also Hart v. Elec. Arts*, 717 F.3d 141 (3d Cir. 2013) (illustrating personality rights in the football context).

25. U.S. COPYRIGHT OFFICE, CIRCULAR 52, COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 3, <https://www.copyright.gov/circs/circ52.pdf> [<https://perma.cc/M2GR-PNK2>].

26. *Id.*

## I. NFL ATHLETES CAN TAKE ADVANTAGE OF LUCRATIVE MARKETING DEALS

In 2017 alone, the NFL anticipated earning fourteen billion dollars in revenue.<sup>27</sup> Over fifteen million fans watched games that year.<sup>28</sup> Fan interest translates into ticket and merchandise revenue—which profits the NFL directly—but such interest also benefits the league’s charismatic players.<sup>29</sup> The charismatic players who also succeed on the field profit through “endorsements, advertising and other deals.”<sup>30</sup>

One such player, fullback Elbert “Ickey” Woods, played in the NFL between 1988 and 1991.<sup>31</sup> After Woods scored a touchdown, he would “shuffle his feet to the right and hold the football out to the right, shuffle his feet to the left and hold the football out to the left, and finally finish by doing three hops to the right and spiking the football into the ground.”<sup>32</sup> This end zone celebration resonated with fans, and Woods’s popularity grew.<sup>33</sup> Woods leveraged his celebrity status to get endorsement deals; as recently as 2016, he performed the “Ickey Shuffle” in a Geico commercial.<sup>34</sup>

Another example of a famous end zone dance is the “Dirty Bird” performed by former Atlanta Falcons running back Jamal Anderson. Upon scoring a touchdown, Anderson “would bounce from one foot to the other” with his arms in a right angle, “and he would pull up and down and

27. Mike Florio, *NFL Will Reach \$14 Billion in 2017 Revenue*, PROFOOTBALLTALK (Mar. 6, 2017, 11:29 AM), <http://profootballtalk.nbcsports.com/2017/03/06/nfl-will-reach-14-billion-in-2017-revenue/> [<https://perma.cc/66AH-3CQY>].

28. *Television Viewership of the NFL Regular Season from 2010 to 2017 (In Million Viewers)*, STATISTA, <https://www.statista.com/statistics/289979/nfl-number-of-tv-viewers-usa/> (last visited Mar. 3, 2019).

29. See Timothy Burke, *For the Last Time: NFL Ratings Are Not Down. They're Up, Compared to Everything Else*, DEADSPIN (July 6, 2018, 9:40 AM), <https://deadspin.com/for-the-last-time-nfl-ratings-are-not-down-theyre-up-1827378925> [<https://perma.cc/AK7D-H4DJ>].

30. Mark Calvey, *Sports Stars Need Help Playing the Numbers Game*, S.F. BUS. TIMES (Sept. 6, 1998, 9:00 PM), <https://www.bizjournals.com/sanfrancisco/stories/1998/09/07/focus2.html> [<https://perma.cc/8NJE-VQZ8>].

31. *Players: Ickey Woods*, NFL, <http://www.nfl.com/player/ickeywoods/2503792/careerstats> [<https://perma.cc/BLL6-5MTB>].

32. *Ickey Shuffle*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Ickey\\_Shuffle](https://en.wikipedia.org/wiki/Ickey_Shuffle) [<https://perma.cc/D568-E794>].

33. See *Sports of the Times; Ickey Shuffles to Miami*, N.Y. TIMES (Jan. 9, 1989), <http://www.nytimes.com/1989/01/09/sports/sports-of-the-times-ickey-shuffles-to-miami.html> [<https://perma.cc/ZN5B-C4F6>].

34. Kalyn Kahler, *Ickey Woods Is Still Shuffling*, SPORTS ILLUSTRATED (Jan. 29, 2016), <https://www.si.com/mmqb/2016/01/29/ickey-woods-nfl-cincinnati-bengals-ickey-shuffle-super-bowl> [<https://perma.cc/U5BG-W98D>].

then in and out, and it would end with him flapping his arms.”<sup>35</sup> These celebrations may be complex enough to garner copyright protection. However, as will be discussed in Part VII, most touchdown celebrations are likely too simplistic to be choreography under the Copyright Act. Examples of simplistic celebrations include when Randy Moss “mooned” the hostile Green Bay crowd at Lambeau Field, when Terrell Owens ate popcorn, or when Doug Baldwin “pooped” the football in the end zone.<sup>36</sup>

Recently, the NFL ran an ad campaign wherein players enlist celebrity “coaches,” including actor Andy Garcia and comedian J.B. Smoove, to help improve their end zone celebrations.<sup>37</sup> The ads are considered a follow up to the popular “Dirty Dancing” parody commercial which aired during Super Bowl LII.<sup>38</sup> The NFL and its players’ use of end zone dances in advertisements demonstrate that these dances are recognizable and profitable.

## II. FORTNITE DANCES AND END ZONE CELEBRATIONS

Choreography, like the touchdown dances of Woods and Anderson, has become an issue because of the exploitive use of dances in a popular video game called Fortnite. Fortnite is an online game estimated to have roughly forty-five million active players as of January 2018.<sup>39</sup> The game generates revenue when players buy in-game currency to purchase various items and dances known as “emotes.”<sup>40</sup> “V-bucks,” the game currency, are purchased in bulk—10,000 for \$99.99, for example—and can be spent in-

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35. Catherine Park, *The History of ‘The Dirty Bird’: How to Do It and Where It Came from*, 11ALIVE (Feb. 3, 2017, 1:23 PM), <https://www.11alive.com/article/sports/nfl/atlanta-falcons/the-history-of-the-dirty-bird-how-to-do-it-and-where-it-came-from/395295435> [<https://perma.cc/7VCS-ZCJW>].

36. *The 20 Best NFL Touchdown Celebrations of All Time: From the Pylon Putter to the Ickey Shuffle*, MASSLIVE (May 31, 2017, 6:00 AM), [http://blog.masslive.com/patriots/2017/05/nfl\\_celebrations\\_top\\_10\\_touchd.html](http://blog.masslive.com/patriots/2017/05/nfl_celebrations_top_10_touchd.html) [<https://perma.cc/RK3Y-JGKB>].

37. *NFL Premieres “Get Ready to Celebrate” Campaign Starring Andy Garcia and J.B. Smoove*, CISION: PR NEWSWIRE (Sept. 14, 2018, 2:06 PM), <https://www.prnewswire.com/news-releases/nfl-premieres-get-ready-to-celebrate-campaign-starring-andy-garcia-and-jb-smoove-300713020.html> [<https://perma.cc/6EFU-Q4P9>].

38. *See id.*

39. LeBoeuf, *supra* note 8.

40. Shawn Farner, *What These Fortnite Emotes Really Mean*, SVG, <https://www.svg.com/134565/what-these-fortnite-emotes-really-mean/> (last visited Feb. 1, 2019).

game.<sup>41</sup> The result is monthly revenue of more than \$300 million for the makers of Fortnite, Epic Games.<sup>42</sup>

Besides the gameplay itself, Fortnite has become a household name for another reason: the dances. As one *Washington Post* article explains, “[s]tyling on other players is a big part of the thrill. After a kill, players can dance on the body, adding a fillip of humor and split-second grace to the victory.”<sup>43</sup> The same article recounted another user’s experience with emotes. Nelsen Le, an avid Fortnite player, said that emotes are “purely aesthetic” and add “another level of personality to the game.”<sup>44</sup>

It is precisely these “emotes” that have led at least one artist to complain.<sup>45</sup> Brooklyn rapper 2 Milly threatened to sue Epic Games for allegedly stealing his signature “Milly Rock” dance and renaming it “Swipe It.”<sup>46</sup> In December 2018, 2 Milly made good on that threat.<sup>47</sup> He dropped the lawsuit the following March, after the U.S. Supreme Court ruled in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*<sup>48</sup> that a party seeking registration must have a decision from the Copyright Office before bringing an infringement claim in court, which 2 Milly did not.<sup>49</sup>

As fellow artist Chance the Rapper put it, “Black creatives created and popularized these dances but never monetized them. Imagine the money people are spending on these Emotes being shared with the artists that made them.”<sup>50</sup> Imagine the amount of money an artist could make from

41. *Fortnite V-Bucks: What They Are, How Much Do They Cost, and Can You Get Free V-Bucks?*, PCGAMESN, <https://www.pcgamesn.com/fortnite/fortnite-free-v-bucks-win-prices-buy> [https://perma.cc/FDM3-A239].

42. Nick Statt, *Fortnite Made Nearly \$300 Million in the Month of April*, VERGE (May 24, 2018, 1:28 PM), <https://www.theverge.com/2018/5/24/17390004/fortnite-battle-royale-money-made-revenue-300-million-april-2018> [https://perma.cc/Z8ED-CMJ7].

43. Sarah L. Kaufman, *The Dances in ‘Fortnite’ Have Become Nearly as Contagious as the Game*, WASH. POST (Sept. 10, 2018), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/09/10/the-dances-in-fortnite-have-become-nearly-as-contagious-as-the-game/?noredirect=on&utm\\_term=.aa76eef892e0](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/09/10/the-dances-in-fortnite-have-become-nearly-as-contagious-as-the-game/?noredirect=on&utm_term=.aa76eef892e0) [https://perma.cc/N5W7-XKWN].

44. *Id.* (quotation omitted).

45. LEGAL ENTMT, *Fortnite Profiting off Dance Moves: Is It Legal?*, FORBES (Sept. 28, 2018, 8:03 PM), <https://www.forbes.com/sites/legalentertainment/2018/09/28/fortnite-profiting-off-dance-moves-is-it-legal/#d79232f424a0> [https://perma.cc/W7SY-JU2Q].

46. *Id.*

47. Eriq Gardner, *Rapper 2 Milly Sues Epic Games for Lifting His Dance Routine in ‘Fortnite’*, HOLLYWOOD REP. (Dec. 5, 2018, 10:27 AM), <https://www.hollywoodreporter.com/thr-esq/rapper-2-milly-sues-epic-games-lifting-his-dance-routine-fortnite-1166625> [https://perma.cc/ZZU7-9MMG].

48. No. 17-571, 2019 WL 1005829 (U.S. Mar. 4, 2019).

49. Stephanie Nunneley, *Fortnite Emote Lawsuit Dropped by 2 Milly, Alfonso Ribeiro, Others*, VG 24/7 (Mar. 9, 2019, 6:57 PM), <https://www.vg247.com/2019/03/09/fortnite-emote-lawsuit-dropped/> [https://perma.cc/C7EJ-UHUS].

50. Gardner, *supra* note 47; see also LEGAL ENTMT, *supra* note 45.



license fees, given that Epic Games has earned over one billion dollars in sales from Fortnite<sup>51</sup>—likely in large part due to the added interest created by emotes.<sup>52</sup>

2 Milly may not be the only one feeling shortchanged. Another emote available in Fortnite is the “Ride the Pony,”<sup>53</sup> which is identical to the dance “Gangnam Style.”<sup>54</sup> Another is the “Floss,” taken from Russell Horning, who became famous when he did the dance while performing with Katy Perry.<sup>55</sup> Fortnite also uses a popular dance from the television show “Scrubs,” performed by actor Donald Faison.<sup>56</sup> Another is “Fresh,” which looks exactly like actor Alfonso Ribeiro’s “Carlton Dance” from the 1990’s television show “Fresh Prince of Bel-Air.”<sup>57</sup> Perhaps buoyed to action after seeing 2 Milly sue Epic Games, Alfonso Ribeiro also sued the Fortnite creator in December 2018.<sup>58</sup> As of the time of writing, Ribeiro, like 2 Milly, has dropped his lawsuit.<sup>59</sup> However, it is foreseeable that Ribeiro and others will sue Epic Games again.<sup>60</sup>

This Comment focuses on NFL end zone celebrations, and thus the question of whether copyright law should protect these other dances is beyond the scope of this Comment. However, Fortnite demonstrates how

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51. LEGAL ENTMT’T, *supra* note 45.

52. One Fortnite fan said that “[w]ithout the emotes you wouldn’t have any fun. It would just be another battle royale game.” Kaufman, *supra* note 43.

53. Wood, *supra* note 10.

54. Annie Pilon, *What Is Gangnam Style? And What Does it Mean for Business?*, SMALL BUS. TRENDS (Nov. 1, 2017), <https://smallbiztrends.com/2013/05/what-is-gangnam-style.html> [<https://perma.cc/4NBN-Y946>].

55. Joshua Morris, *From Fortnite to the Classroom: The ‘Floss’ Dance Craze Sweeping Schools*, TES (Apr. 24, 2018), <https://www.tes.com/news/fortnite-classroom-floss-dance-craze-sweeping-schools> [<https://perma.cc/8PTA-P7PL>].

56. *Fortnite Dances in Real Life*, BEANO, <https://www.beano.com/posts/7-best-fortnite-dances-in-real-life> (last visited Mar. 10, 2019).

57. Wood, *supra* note 10.

58. Emily Birnbaum, *‘Fresh Prince of Bel Air’ Star Accuses ‘Fortnite’ Creators of Stealing His ‘Carlton Dance’*, HILL (Dec. 17, 2018, 5:45 PM), <https://thehill.com/policy/technology/421779-fresh-prince-of-bel-air-star-sues-fortnite-creators-for-stealing-his> [<https://perma.cc/ZSK3-S8AF>].

59. Nunneley, *supra* note 49.

60. Bill Donahue, *After Big Copyright Ruling, Dance Cases to be Refiled*, LAW360 (Mar. 7, 2019), <https://www.law360.com/articles/1136676/after-big-copyright-ruling-dance-cases-to-be-refiled> (last visited Mar. 13, 2019). Both the “Milly Rock” and the “Carlton dance” were refused registrations by the Copyright Office, but this was after the lawsuits against Epic Games were filed. Even though these refusals do not exactly bode well for their cases, it is ultimately up to the courts to decide whether something is copyrightable. *Id.*

successfully commercial enterprises can monetize celebrity dances.<sup>61</sup> Thus, the artists' outcry should not come as a surprise.

Like Fortnite, the NFL video game series "Madden," created by EA Sports in 1988, finds inspiration from real life.<sup>62</sup> As video game technology improved, the playable NFL characters went from solely wearing NFL athletes' names on jerseys, to having those athletes' faces, to—in the latest iteration, "Madden NFL 19"—acting out the athletes' real-life signature end zone celebrations.<sup>63</sup> The crucial difference between EA Sports and Fortnite is that EA Sports pays for the right to do all of this: it licenses directly from the NFL the right to use team names, uniforms, and symbols, and it licenses from the NFL Players Association the personality rights to the more than 2,000 NFL athletes.<sup>64</sup> Since Fortnite uses highly recognizable dances, profiting handsomely in doing so, why would they not eventually use end zone dances as well?

### III. COPYRIGHT LAW: WHAT IT PROVIDES AND WHAT IT REQUIRES

Copyright law may provide protection for end zone celebrations. Copyright law protects original works of authorship fixed in a tangible medium of expression.<sup>65</sup> Authors can register their copyright with the Copyright Office, which administers copyright law.<sup>66</sup> Unlike patents, registration is not required for copyright protection, though registration

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61. This almost happened in a slightly different context as well. Jet Li was originally considered for a part in *The Matrix* but turned it down for fear that filmmakers would own his kung fu moves "as an intellectual property forever." Josh Ye, *Jet Li Says He Rejected The Matrix Because He Didn't Want His Kung Fu Moves Digitally Recorded*, ABACUS NEWS (Oct. 18, 2018, 4:49 AM), <https://www.abacusnews.com/digital-life/jet-li-says-he-rejected-matrix-because-he-didnt-want-his-kung-fu-moves-digitally-recorded/article/2169070> [<https://perma.cc/P875-9Z45>]. Unlike with Fortnite, however, at least Li would have received compensation.

62. See James Brady, *Exploring the (Weird) Story of the Very First 'John Madden Football' Game*, SBNATION (Aug. 7, 2018, 8:00 AM), <https://www.sbnation.com/2018/8/7/17599240/john-madden-football-apple-ii-genesis-original-story-trip-hawkins> [<https://perma.cc/C9NV-U4JK>].

63. Kevin Wong, *How 'Madden NFL 19' Included Every Player's Signature TD Celebration*, COMPLEX (Aug. 9, 2018), <https://www.complex.com/sports/2018/08/madden-nfl-19-touchdown-celebrations> [<https://perma.cc/5DXR-PCP5>].

64. Owen Good, *Remember: It's Not Just the NFL's Exclusive License with Madden; the Players' Union Has One, Too.*, KOTAKU (Mar. 4, 2013, 11:00 AM), <https://kotaku.com/5988357/remember-its-not-just-the-nfls-exclusive-license-with-madden-the-players-union-has-one-too> [<https://perma.cc/6THP-HEZR>].

65. 17 U.S.C. § 102(a) (2018).

66. U.S. COPYRIGHT OFFICE, CIRCULAR 1A, UNITED STATES COPYRIGHT OFFICE: A BRIEF INTRODUCTION AND HISTORY, <https://www.copyright.gov/circs/circ1a.html> [<https://perma.cc/8FR6-WZG2>].

(or refusal of registration by the Copyright Office) *is* required to file an infringement action.<sup>67</sup>

Copyright protection is an economic incentive in the form of a limited monopoly.<sup>68</sup> The framework of protection is based on exclusive rights of the author, including the rights to reproduce the work, prepare derivative works based upon the work, and perform the work.<sup>69</sup>

The duration of copyright protection is extensive—typically, the life of the author plus seventy years.<sup>70</sup> This length varies based on whether the work is created by multiple authors<sup>71</sup> and whether the work is anonymous, pseudonymous, or made for hire.<sup>72</sup> The numerous doctrinal obstacles to copyrightability cause this monopoly to be limited.

One such obstacle is the balance between incentivizing authors to create and leaving sufficient building blocks in the public domain for creation to occur in the first place.<sup>73</sup> For example, an author might feel motivated to copyright the word “the.” However, copyright prohibits authors from copyrighting words and short phrases.<sup>74</sup> Given that the word “the” is so common, without being able to use it, other authors would effectively be prevented from writing and creating work. This harm outweighs the benefit to the single author in possession of the copyright. Perhaps that author is discouraged, but, in a utilitarian sense, the greater good is served by allowing more authors to create.

A work is eligible for copyright protection if it is an original work of authorship fixed in a tangible medium of expression.<sup>75</sup> Though the work as a whole technically receives copyright protection, the protection in practice is spotty and porous. For example, a copyrighted book has protection for its creative expression, but not for any non-expressive text it contains, like facts.<sup>76</sup> The requirement of originality, however, is deceptively simple.

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67. 17 U.S.C. § 411(a). *Fourth Estate Public Benefit Corp. v. Wall-Street.com* clarified that merely applying for registration and suing while the registration was pending is not sufficient. No. 17-571, 2019 WL 1005829, at \*7 (U.S. Mar. 4, 2019).

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

69. 17 U.S.C. § 106.

70. *Id.* § 302(a).

71. See *id.* § 302(b).

72. See *id.* § 302(c).

73. *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015).

74. See *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1352 (Fed. Cir. 2014).

75. 17 U.S.C. § 102(a).

76. *Bikram’s*, 803 F.3d at 1037.

### A. Originality

An author seeking copyright protection must establish, among other things, that the work is original.<sup>77</sup> Originality has two elements: independent creation and creativity.<sup>78</sup> To be original, a work must be original to the author as opposed to a copy of someone else's work.<sup>79</sup> Though unlikely, two authors might produce the exact same works independently and could therefore each receive copyright protection.<sup>80</sup>

In addition, while novelty is not required, originality does require a "modicum of creativity."<sup>81</sup> Courts do not judge the artistic merit of the work beyond finding that some modicum of creativity exists.<sup>82</sup> Indeed, in *Bleistein v. Donaldson Lithographing Co.*,<sup>83</sup> the Court notes it "would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges" of artistic works.<sup>84</sup>

Copyright protects creative expression, so largely factual works are not protectable: a phonebook with information predictably and alphabetically organized would not receive copyright protection for the facts or its arrangement of them.<sup>85</sup> Facts exist independently of each person, are not original to anybody, and therefore are not protected.<sup>86</sup> Nevertheless, a creative *arrangement* of those same facts could receive copyright protection.<sup>87</sup> Given copyright's spotty and porous protection, a creative novel about a historical event would receive copyright, but that protection would not extend to any historical facts in the work.<sup>88</sup> Similarly, any work that included parts of works no longer under copyright, such as *Romeo and Juliet*, would only be partially protected.<sup>89</sup>

Since most "names and short phrases"<sup>90</sup> are not original, they typically do not receive copyright protection. They are often trivial, and society

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

78. *Id.*

79. *Id.* at 345–46.

80. *Id.*

81. *Id.* at 346.

82. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

83. 188 U.S. 239 (1903).

84. *Id.* at 251.

85. *Feist*, 499 U.S. at 363.

86. *Id.* at 347.

87. *Id.* at 362.

88. *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 293 (S.D.N.Y. 2012).

89. *See Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 914 (7th Cir. 1996).

90. *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1352 (Fed. Cir. 2014) (citing *Oracle Am., Inc. v. Google Inc.*, 872 F. Supp. 2d 974, 998 (N.D. Cal. 2012)).

needs access to such building blocks in order to continue to create. Notwithstanding this consideration, the originality bar for copyright protection is still relatively low.

### B. *Works of Authorship*

Copyright also requires that a work is a work of authorship. A “work[] of authorship”<sup>91</sup> might include: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”<sup>92</sup>

While choreographic works are undefined in the Copyright Act, the Copyright Office defines “choreography” as “the composition and arrangement of dance movements and patterns,” and states that such works “need not tell a story in order to be protected by copyright.”<sup>93</sup>

In addition, derivatives and compilations are copyrightable as separate works of authorship.<sup>94</sup> Derivative works, “work[s] based upon one or more preexisting works,” are artistic works that use other works as a basis for a new work; they may include film adaptations, musical arrangements, or translations.<sup>95</sup>

Another example of a work of authorship is a compilation.<sup>96</sup> A compilation was the work of authorship at issue in *Feist Publishing v. Rural Telephone Service*,<sup>97</sup> specifically a phonebook.<sup>98</sup> The Copyright Act defines these works as those “formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>99</sup>

Ultimately, given that the work of authorship list is merely illustrative, an author has many options when satisfying the requirement.

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91. 17 U.S.C. § 102(a) (2018).

92. *Id.*

93. U.S. COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450.01 (2d ed. 1984) (hereinafter COMPENDIUM II).

94. 17 U.S.C. § 103.

95. *Id.* § 101.

96. *Id.*

97. 499 U.S. 340 (1991).

98. *Id.* at 342–44.

99. 17 U.S.C. § 101.

C. *The Work Must Be Fixed in a Tangible Medium of Expression*

Copyright law also requires works to be fixed in a tangible medium of expression.<sup>100</sup> “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>101</sup> The page on which a song is written fixes a musical work, and the RAM of a computer fixes a computer program.<sup>102</sup> The Copyright Act does not specify that a particular type of work must be fixed by a particular medium, so an audio recorder could fix a literary work read aloud, and choreography could be fixed through filming.<sup>103</sup> That is, it is not the performance of the choreography that satisfies the fixation requirement, but rather the recording of the performance.<sup>104</sup> Though, at times, it may be difficult to determine if a work is fixed, it is a strict prerequisite to any copyright.<sup>105</sup>

#### IV. OBSTACLES TO COPYRIGHTABILITY

This Part discusses the obstacles beyond the basic thresholds of an original work of authorship fixed in a tangible medium of expression. The term “obstacle,” however, is used here in a broad sense: it encompasses not only characteristics the work must have before the Copyright Office will grant a copyright, but also characteristics that will affect an author’s decision to pursue copyright. For example, for concepts like works made for hire, the issue is less about whether anyone *can* claim a copyright to the work, but rather about the disincentive to create in the first place. Functionality, on the other hand, is a “true” obstacle in that no one can lay claim to a work that is functional rather than expressive. Finally, other doctrines offer a refined look at what copyright requires in order for something to be “expression” in the first place.

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100. *Id.* § 102(a).

101. *Id.*

102. *Obtaining Copyright Protection*, BITLAW, <https://www.bitlaw.com/copyright/obtaining.html> [<https://perma.cc/7WHE-6AQA>].

103. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 632 (2d Cir. 2004).

104. *Id.*

105. 17 U.S.C. § 102(a).

A. *Idea/Expression, the Merger Doctrine, and Scènes à Faire*

Three obstacles to copyright are idea/expression, the merger doctrine, and scènes à faire. The fixation requirement discussed above focuses on a tangible medium of *expression*, a term that can be more easily understood by reference to what it is *not*. Expression is not an “idea, procedure, process, system, method of operation, concept, principle, or discovery,” none of which are copyrightable<sup>106</sup>; they either belong in the public domain or are protected by patent law.<sup>107</sup> The line between idea and expression is not always clear, but typically depends on the level of concreteness and specificity of the work in contrast to the work’s abstractness, like an idea.<sup>108</sup> For example, “using cartoon characters drawn in three dimensions who interact in a movie seamlessly with human actors is . . . an idea, rather than an expression.”<sup>109</sup> Further, a producer of accounting workbooks can copyright whatever expressive descriptions they have, but the basic blank accounting tables are considered ideas and therefore are not copyrightable.<sup>110</sup>

Echoing this logic, Bikram Choudhury received a copyright for his book that described yoga sequences.<sup>111</sup> However, he did not receive a copyright for his self-described yoga “system,” because it did not meet the definition of expression.<sup>112</sup> Because Yoga is primarily done for health reasons and not to express something, the specific poses were not copyrightable.<sup>113</sup>

An extension of this idea/expression dichotomy is the merger doctrine: When there is only one or a few ways of expressing an idea, courts will find that the idea merges with its expression and the work is therefore not copyrightable.<sup>114</sup> For example, when a sweepstakes owner tried to copyright the wording of his competition’s rules, the court denied the copyright because it found that relatively few possible rule phrasings

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106. *Id.* § 102(b).

107. *See Eldred v. Ashcroft*, 537 U.S. 186, 225 (2003).

108. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

109. Douglas G. Baird, *Does Bogart Still Get Scale? Rights of Publicity in the Digital Age* 4 (John M. Olin Program in Law and Econ., Working Paper No. 120, 2001), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1177&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1177&context=law_and_economics) [https://perma.cc/U6F2-RQ58].

110. *See Baker v. Selden*, 101 U.S. 99 (1879).

111. *Bikram’s Yoga Coll. of India L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1035 (9th Cir. 2015).

112. *Id.* at 1036.

113. *Id.*

114. *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967).

existed. Therefore, one variation of those possibilities did not merit protection.<sup>115</sup>

Similarly, certain elements in a work may be defined as “scènes à faire” and therefore are not protectable. Even if expressive, elements are not copyrightable “if they are standard, stock, or common to a topic, or if they necessarily follow from a common theme or setting.”<sup>116</sup> In *Nichols v. Universal Pictures Corp.*,<sup>117</sup> a defendant was found not liable for allegedly infringing an author’s characters, “the low comedy Jew and Irishman,” because the defendant had “not taken from [the author] more than [the characters’] prototypes have contained for many decades.”<sup>118</sup> To allow copyright protection of those “stock figures” would give the author a copyright for “what was not original with her.”<sup>119</sup>

Thus, when it comes to works of authorship—whether choreography or otherwise—authors should make sure their works overcome the idea/expression, merger doctrine, and scènes à faire obstacles.

#### *B. A Work Made for Hire Does Not Belong to the Creator*

The ownership of an original work of authorship vests in its creator upon the work’s creation.<sup>120</sup> The exception to this rule is any work made for hire.<sup>121</sup> When a work is made for hire, the copyright belongs to the “employer or other person for whom the work was prepared” unless the parties agree otherwise.<sup>122</sup> Specifically, the Copyright Act defines “work made for hire” to include the following:

- (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 a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in

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115. *Id.* at 676.

116. *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1374 (10th Cir. 1997).

117. 45 F.2d 119, 122 (2d Cir. 1930).

118. *Id.*

119. *Id.*

120. 17 U.S.C. § 201(a) (2018).

121. *See id.* § 201(b).

122. *Id.*



a written instrument signed by them that the work shall be considered a work made for hire.<sup>123</sup>

The term “employee” carries its common law agency meaning, centering on whether the hiring party has the “right to control the manner and means by which the product is accomplished.”<sup>124</sup> When determining whether an individual is an employee versus an independent contractor, courts will consider factors including the skill required, the source of the tools needed, and the duration of the relationship between the parties.<sup>125</sup>

These factors are illustrative, not exhaustive, and no single factor is determinative.<sup>126</sup> In *Community for Creative Non-Violence v. Reid*,<sup>127</sup> a non-profit that had commissioned a sculpture disputed the ownership of the sculpture with Reid, the artist.<sup>128</sup> The Court determined that, because Reid was engaged in a skilled occupation, supplied his own tools, worked in his own studio, was retained by the plaintiff non-profit for a short amount of time, had freedom as to his work schedule, and was paid for the specific job, Reid was an independent contractor.<sup>129</sup> Because the sculpture did not fit any of the work made for hire categories and there was no express agreement that the work would belong to Community for Creative Non-Violence, the copyright in the sculpture ultimately belonged to Reid.<sup>130</sup>

“Scope of employment” carries its common law agency meaning.<sup>131</sup> Conduct is within the scope of employment if “(a) it is of the kind [the employee] is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.”<sup>132</sup> Therefore, the work made for hire doctrine is relevant to potential authors who create works in a professional setting.

*Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*<sup>133</sup> involved the work made

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123. *Id.* § 101.

124. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

125. *Id.*

126. *Id.* at 752.

127. 490 U.S. 730 (1989).

128. *Id.* at 735.

129. *Id.* at 753.

130. *Id.*

131. *Id.* at 740.

132. RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958).

133. 380 F.3d 624 (2d Cir. 2004).

for hire doctrine in the context of choreography.<sup>134</sup> The dispute centered on whether a dance school owned the copyright to several dances.<sup>135</sup> After considering the factors—whether the individual was an employee, whether she was full-time, and whether the choreography fell into her scope of employment—the court concluded the dances were not works made for hire.<sup>136</sup> Whether a visual art context like *Reid* or a choreography context like *Martha Graham School*, courts focus on the *Restatement of Agency* factors in assessing whether a work made for hire exists.

Thus, although there are several requirements before a work is deemed a work made for hire, the potential consequence is significant: the creator of the work does not retain its copyright.

## V. FAIR USE IS A DEFENSE TO COPYRIGHT INFRINGEMENT

Copyright infringement stems from a violation of exclusive rights.<sup>137</sup> When an infringement takes place, however, a defendant may claim fair use, which operates as a complete defense to infringement if properly invoked.<sup>138</sup> Courts look to four factors listed in 17 U.S.C. § 107 when deciding whether a defendant has a valid fair use defense:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>139</sup>

The Copyright Act provides examples of fair uses, including “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>140</sup>

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134. *Id.*

135. *Id.* at 628.

136. *Id.* at 637.

137. *See* 17 U.S.C. § 106 (2018); *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 984 (9th Cir. 2017) (“To prove copyright infringement, a plaintiff must demonstrate (1) ownership of the allegedly infringed work and (2) copying of the protected elements of the work by the defendant.” (quoting *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991))).

138. 17 U.S.C. § 107.

139. *Id.*

140. *Id.*

One of the most important fair use cases, *Campbell v. Acuff-Rose Music, Inc.*,<sup>141</sup> involved the rap group 2 Live Crew, which sampled the Roy Orbison song “Oh, Pretty Woman” and incorporated it into their own song entitled “Pretty Woman.”<sup>142</sup> Starting with the first element of § 107, the U.S. Supreme Court made clear that a commercial use is not presumptively unfair.<sup>143</sup> The “central” question of element one was whether the use was “transformative,” meaning it added “something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>144</sup> The Court found that the rap group’s version was a parodic criticism, a type of work that could “provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”<sup>145</sup>

The second factor of the fair use analysis “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”<sup>146</sup> The Court gave examples of fictional short stories as opposed to largely factual works, and motion pictures as opposed to news broadcasts, as works closer to the core of intended copyright protection.<sup>147</sup> The Court had no trouble concluding that “Oh, Pretty Woman,” had sufficient originality, meaning that 2 Live Crew did not meet the second factor of the fair use defense.<sup>148</sup>

The third factor requires justification for the amount taken from the work at issue.<sup>149</sup> Parody, however, “presents a difficult case.”<sup>150</sup> In order for parody to be effective, a certain portion of the original needs to be taken in order to “‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.”<sup>151</sup> This can be allowed even if the parody takes the “heart” of the original work.<sup>152</sup> However, the Court warned that a purported parodist needs to show that they actually added something themselves, so as not to “skim the cream and get away scot

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141. 510 U.S. 569 (1994).

142. *Id.* at 572.

143. *Id.* at 570.

144. *Id.* at 579.

145. *Id.*

146. *Id.* at 586.

147. *Id.*

148. *Id.*

149. 17 U.S.C. § 107 (2018).

150. *Campbell*, 510 U.S. at 588.

151. *Id.*

152. *Id.*

free.”<sup>153</sup> 2 Live Crew satisfied this requirement because, even though they copied the central bass riff of the song, they “produced otherwise distinctive sounds,” altered the drum beat, and had largely different lyrics.<sup>154</sup> Hence, though the rap group borrowed from the original, they supplied their own creative expression as well.<sup>155</sup>

Finally, fair use requires analyzing not only the harm to the original work, but also the market for derivative works.<sup>156</sup> In other words, courts weigh the extent to which the work invoking fair use functions as a “market replacement”<sup>157</sup> for the original. In addition, courts look to how likely it is that the owner of the original will suffer a loss of profits due to a derivative of their work—like a movie based on a book—should the owner ever choose to create that derivative.<sup>158</sup> This is for two reasons. First, if consumers see the two works equally such that the “fair use” work displaces sales for the original, then the “fair use” work is not adding anything new and is just a reproduction undeserving of the fair use defense.<sup>159</sup> Second, it is foreseeable that an author of a novel may have plans to create a movie based on the novel, or to license that right to a film studio with the resources to do so. If someone creates a film based on the novel before the author does, that author could lose out financially, making the fourth factor in that case weigh against allowing fair use.<sup>160</sup> This fourth factor is directly linked to the first factor, given that a transformative use is less likely to displace the market for the original.<sup>161</sup>

In the case of “Oh, Pretty Woman,” however, the Court stated that the “law recognizes no derivative market for critical works.”<sup>162</sup> Because practically no author—regardless of specific artistic discipline—would release a parody of their own work, that author, at least in theory, is not harmed when someone else makes a parody.<sup>163</sup> The Court cautioned, however, that there may be non-parodic elements in a parody; “Pretty Woman” was a rap song, and a plaintiff may have a right to take advantage

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153. *Id.* at 589.

154. *Id.*

155. *See id.*

156. 17 U.S.C. § 107 (2018).

157. *Campbell*, 510 U.S. at 591.

158. *Id.*

159. *See id.*

160. *See id.*

161. *See id.*

162. *Id.* at 592.

163. *See id.*

of any “derivative market for rap music.”<sup>164</sup> Finally, the Court made clear that the only harm it defends against is the aforementioned “harm of market substitution.”<sup>165</sup> If, instead, a parody or other criticism is so effective that consumers see the original—or any of its derivatives—as less desirable, that is irrelevant in analyzing fair use.<sup>166</sup>

Ultimately, *Campbell* was remanded to the trial court to review more evidence as to whether the group violated the fourth factor.<sup>167</sup> However, *Campbell* remains a helpful case in understanding how the four factors apply when analyzing the fair use defense.

Overall, fair use is an important defense to copyright infringement, but will not redeem individuals who merely try to pass off someone else’s work as their own.

## VI. THE COPYRIGHTABILITY OF CHOREOGRAPHY

While choreography is one of the categories of copyrightable expression,<sup>168</sup> there is a general lack of case law on choreography copyrightability.<sup>169</sup> There are several possible explanations for this, including that choreography is rarely infringed, or perhaps owners of choreography do not wish to pursue litigation. This latter reason could be simple indifference, or it could signal that individuals are aware of the relatively weak protection for choreography. For example, *Horgan v. Macmillan, Inc.*<sup>170</sup> made clear that “social dance steps and simple routines” do not receive copyright protection.<sup>171</sup> The hurdle to copyrighting choreography is distinguishing “simple routines,”<sup>172</sup> which do not merit copyright protection, from routines that are more expressive and hence copyrightable. The definition of choreography is found not in the Copyright Act but rather in The Compendium of Copyright Office Practices (1984):

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164. *Id.* at 593.

165. *Id.*

166. *Id.*

167. *Id.* at 594.

168. 17 U.S.C. § 102(a)(4) (2018).

169. Those cases that do focus on choreography are often about issues like the work made for hire doctrine, rather than the boundaries of copyrightable choreography. *See, e.g.,* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 632 (2d Cir. 2004) (discussing the ability to copyright choreography in depth).

170. 789 F.2d 157 (2d Cir. 1986).

171. *Id.* at 161 (citing COMPENDIUM II, *supra* note 93, § 450.01).

172. *Id.* (citing COMPENDIUM II, *supra* note 93, § 450.06).

Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.<sup>173</sup>

Several cases help define the contours of this aspect of choreography. For example, *Horgan* involved the infringement of George Balanchine's version of *The Nutcracker* ballet by a book of photographs. On appeal, the appellate court admonished the district court as to its view that "still photographs cannot infringe choreography."<sup>174</sup> The district court concluded that the book did not infringe the plaintiff's copyright "because choreography is the flow of steps in a ballet, which could not be reproduced from the still photographs in the book."<sup>175</sup> The appellate court responded by pointing out that "when the allegedly infringing material is in a different medium, as it is here, recreation of the original from the infringing material is unlikely if not impossible, but that is not a defense to infringement."<sup>176</sup> The court then described the harm of a particular seemingly harmless snapshot:

In this photograph, the Sugar Canes are a foot or more off the ground, holding large hoops above their heads. One member of the ensemble is jumping through a hoop, which is held extended in front of the dancer. . . . The viewer understands instinctively, based simply on the laws of gravity, that the Sugar Canes jumped up from the floor only a moment earlier, and came down shortly after the photographed moment. . . . The single instant thus communicates far more than a single chord of a Beethoven symphony—the analogy suggested by the district judge.<sup>177</sup>

Thus, *Horgan* establishes that even a seemingly small piece of copyrightable expression taken improperly can constitute infringement.<sup>178</sup> However, at least one author takes umbrage with the court's approach in *Horgan*:

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173. *Id.* The Compendium was updated in 2017 without a substantively significant change to the definition of choreography. The 1984 version is preferred here because it better consolidates and summarizes the relevant information.

174. *Id.* at 163.

175. *Id.* at 158.

176. *Id.* at 162.

177. *Id.* at 163.

178. *Id.*

[I]t is the movement between individual dance steps which should be considered the copyrightable element—what the Horgan district court correctly identified as the “flow” . . . Without focusing on the flow, a court could find a choreographic work to have infringed another when it utilizes similar positions in a similar sequence, even if it uses completely different movements between those positions, making the works fundamentally different. By ignoring the flow of movement, copyright law fails to protect expression accurately and thus cuts into the area which should remain free of copyright, and free for general use.<sup>179</sup>

There is also little doubt that ballet is copyrightable as choreography, as Balanchine was able to register his production with the Copyright Office and the court in this case accepted the registration as valid.<sup>180</sup> The problem, however, is the court’s analysis does not go much further than that; the court missed an opportunity to set out a clear view of the bounds of copyrightable choreography, instead relying on “inconclusive legislative reports.”<sup>181</sup>

Another significant case on the copyrightability of choreography is *Bikram’s Yoga College of India, L.P. v. Evolation Yoga, LLC*,<sup>182</sup> which analyzes the doctrine of functionality. Functionality is closely related to the idea/expression dichotomy; where a work serves some functional use other than expression, copyright protection is barred.<sup>183</sup> It is the reason that, in *Bikram’s*, Bikram Choudhury could not receive copyright protection for his yoga exercises; he himself admitted “the medical and functional considerations at the heart of the Sequence compel the very selection and arrangement of poses and breathing exercises.”<sup>184</sup>

Non-choreography examples help illustrate this concept, such as the blank accounting tables at issue in *Baker v. Selden*.<sup>185</sup> The tables were not expressive but rather useful in performing the accounting process; to allow copyright of the tables, and by extension that process, is to tread on patent law.<sup>186</sup> Cookbooks are analogous to the accounting tables in *Baker*,

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179. Joi Michelle Lakes, *A Pas De Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1849 (2005).

180. *Id.* at 1844.

181. Bethany M. Forcucci, *Dancing Around the Issues of Choreography & Copyright: Protecting Choreographers After Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 24 QUINNIPIAC L. REV. 931, 939 (2006).

182. 803 F.3d 1032 (9th Cir. 2015).

183. *Id.* at 1042.

184. *Id.*

185. 101 U.S. 99 (1879).

186. *Id.*

as any creative expressions in the literary works could be protected, but not if they “merely ‘describe a procedure by which the reader may produce many dishes.’”<sup>187</sup>

There is no requirement that an author must express for expression’s sake;<sup>188</sup> to the contrary, the Copyright Act expects that some sort of potential profit might be present as an incentive to create works of authorship.<sup>189</sup> However, even though beauty and grace might be involved, where the primary “function” is health and utility rather than choreographic or other expression, there is no copyright.<sup>190</sup>

## VII. COPYRIGHT LAW WILL NOT PROTECT MOST END ZONE CELEBRATIONS

Given the potential monetary value of an end zone celebration, would Fortnite ever steal moves from NFL players? It is very possible. However, would the players have a remedy? In theory, end zone celebrations may meet copyright law’s thresholds for protectability. In practice, most end zone celebrations are too trivial, lacking even the basic creativity required for copyright protection. The fair use doctrine complicates the analysis further, as does the work made for hire doctrine, under which ownership of the copyright is affected.<sup>191</sup>

Assuming a player comes up with unique expression, copyright’s low threshold of originality might be satisfied. Linebacker Ray Lewis would arguably meet this standard with his famous “Squirrel Dance”: “a slide to the left, a slide to the right, a wiggle of his legs, a thrust of his pelvis, a puff of his chest, and a roar.”<sup>192</sup>

Given that the Copyright Office considers “choreographic works”<sup>193</sup> as “dance movements and patterns,”<sup>194</sup> this fourth category of 17 U.S.C. § 102(a) is the most logical fit for a bodily movement like an end zone celebration. Finally, fixation also would not be a problem, as games are

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187. *Bikram’s*, 803 F.3d at 1038 (citing *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996)).

188. *See* U.S. CONST. art. I, § 8, cl. 8 (stating Congress’s power to grant authors and inventors a limited monopoly on their creations and discoveries in order to promote the progress of science and the arts).

189. *Id.*

190. *See id.*; *Bikram’s*, 803 F.3d at 1040.

191. *See supra* Part III.

192. Simon Samano, *Ray Lewis Shares the Origins of His ‘Squirrel’ Dance*, USA TODAY (Jan. 6, 2013, 7:46 PM), <https://www.usatoday.com/story/gameon/2013/01/06/ravens-ray-lewis-squirrel-dance/1812555/> [<https://perma.cc/D8GZ-37WE>].

193. COMPENDIUM II, *supra* note 93, § 450.06.

194. *Id.*



televised, including celebrations.<sup>195</sup> There are, however, other obstacles to copyright.

*A. Idea/Expression and Related Doctrines Hinder Copyrightability of Celebrations*

The idea/expression dichotomy, merger doctrine, and scènes à faire further thin the pool of potentially copyrightable end zone celebrations; even something that is original, fixed, and a work of authorship could lack copyrightability if one of these obstacles applies. For example, a common individual celebration in football is the “spike.”<sup>196</sup> Rob Gronkowski throws the ball with all his might, Luke Willson spikes the ball and then heaves his arms in the air,<sup>197</sup> and Jimmy Graham jumps into the air before spiking.<sup>198</sup> Ultimately, they are simply smashing a football into the ground. There are only so many ways to throw a football into the ground, such that the idea of it merges with the expression—becoming unprotectable. Because the spike has become associated with a touchdown, it may also be considered scènes à faire, an unprotectable cliché that inevitably flows from the idea of a touchdown celebration.<sup>199</sup>

Even the most recognizable celebrations are unlikely to be copyrightable. LaDainian Tomlinson was known to flip the ball with one hand while resting the other behind his head,<sup>200</sup> Cam Newton pretends to pull his shirt apart à la Superman,<sup>201</sup> and Victor Cruz salsa

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195. See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 632 (2d Cir. 2004) (“In this case, the parties do not dispute that all of the 70 dances are eligible for statutory copyright, presumably because they have been filmed or videotaped.”).

196. See Nicole Yang, *Rob Gronkowski Shared the Secret Behind a Perfect Gronk Spike*, BOSTON.COM (Nov. 8, 2017), <https://www.boston.com/sports/new-england-patriots/2017/11/08/rob-gronkowski-shared-the-secret-behind-a-perfect-gronk-spike> (last visited Mar. 10, 2019).

197. *How Canadian Seattle Seahawk Luke Willson Celebrates TDs*, CBC (Jan. 23, 2015, 6:00 AM), <https://www.cbc.ca/news/canada/windsor/how-canadian-seattle-seahawk-luke-willson-celebrates-tds-1.2919857> [<https://perma.cc/E22N-WK6U>].

198. Dave Boling, *Seahawks’ Jimmy Graham Getting Lots of Practice on His TD Spike*, NEWS TRIB. (June 2, 2015, 5:55 PM), <https://www.thenewstribune.com/sports/spt-columns-blogs/dave-boling/article26296390.html> [<https://perma.cc/2MAX-BWCG>].

199. See *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1374 (10th Cir. 1997) (“Under the scenes a faire doctrine, expressive elements of a work of authorship are not entitled to protection against infringement if they are standard, stock, or common to a topic, or if they necessarily follow from a common theme or setting.”).

200. *Every TD from LaDainian Tomlinson’s Record-Breaking Season*, NFL, <http://www.nfl.com/videos/san-diego-chargers/0ap3000000817124/Every-TD-from-LaDainian-Tomlinson-s-record-breaking-season> [<https://perma.cc/K2QE-W6PV>].

201. *Newton Rushing Touchdown*, NFL, <http://www.nfl.com/videos/nfl-game-highlights/0ap2000000089786/Newton-rushing-touchdown> [<https://perma.cc/SU74-YR4N>].

dances.<sup>202</sup> Tomlinson’s and Newton’s celebrations might fail to even meet copyright’s low originality threshold because they are “simple routines,”<sup>203</sup> or, alternatively, fall victim to the merger doctrine much like the spike. Cruz’s salsa dance, meanwhile, seems to fit the common understanding of a “social dance.”<sup>204</sup>

*B. The Work Made for Hire Doctrine Means Players May Have Few Rights*

Even if a player comes up with a copyrightable celebration, the copyright may end up belonging to his team or the NFL. A player in the NFL is not an independent contractor.<sup>205</sup> At least until a player is traded or cut, he plays for one team, and that team controls when and how team practices will occur as well as what a player must do in games.<sup>206</sup> Further, teams pay players an annual salary, indicating that an individual is an employee rather than an independent contractor.<sup>207</sup> If we know an individual is an employee as opposed to an independent contractor, the next question is whether the individual’s conduct was within the scope of employment.<sup>208</sup> As discussed, employee conduct is within the scope of employment if “(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.”<sup>209</sup> If the team owner is ultimately interested in making money, and the player’s celebration creates more fan interest, then it is likely also work “of the kind he is employed to perform.”<sup>210</sup> This line of reasoning may equally well fit the “purpose” element.<sup>211</sup> Also, the celebration occurs within the “authorized time and space limits”<sup>212</sup> because, though the clock stops after

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202. *Salsa Dancing by Victor Cruz*, NFL, <http://www.nfl.com/videos/new-york-giants/09000d5d828e0ff7/Salsa-dancing-by-Victor-Cruz> [<https://perma.cc/ZC8F-K3YT>].

203. *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986).

204. *Id.*

205. Marc Edelman, *Can the NFL Really Fire Players for Kneeling During the National Anthem?*, FORBES (Sept. 28, 2017, 2:27 PM), <https://www.forbes.com/sites/marcedelman/2017/09/28/nfl-trump-kneeling-national-anthem/#4f3fe1e02976> [<https://perma.cc/HU73-M8D5>] (referring to players as employees throughout the article).

206. See Jessica Mah, *These 3 Factors Distinguish Employees from Contractors*, INC. (Sept. 15, 2015), <https://www.inc.com/jessica-mah/the-3-factors-that-distinguish-employees-from-contractors.html> [<https://perma.cc/V4ZA-E3WE>].

207. *Sica v. Equitable Life Assurance Soc’y of the U.S.*, 756 F. Supp. 539, 542 (D. Fla. 1990).

208. 17 U.S.C. § 101 (2018).

209. RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958).

210. *See id.*

211. *See id.*

212. *See id.*

a score, players are transitioning and fans are still watching. Further, the celebration happens on the field and therefore satisfies the “space” aspect as well. Given that a player in the NFL is an employee, and a celebration likely fits within the scope of employment, a player’s copyrightable moves would ultimately belong to the employer.

Thus, if Fortnite (or anyone else for that matter) infringed a copyrightable end zone celebration, the plaintiff might not be the player, but rather the NFL organization or team. It is important to remember, however, that the work for hire issue would only be considered if a court deemed the choreography copyrightable in the first place.

As discussed in Section IV.B, the work made for hire doctrine is certainly not unique to football or sports in general. But copyright law aims to incentivize authors to create. Therefore, the fact that—even after clearing the aforementioned hurdles of copyrightability—a player can lose ownership of his work could serve as a strong deterrent against creating the work.

### *C. Fortnite Would Not Have a Fair Use Defense If It Stole Celebrations*

If a touchdown celebration is successfully copyrighted, anyone who infringes that copyright must establish a fair use defense to successfully defend a lawsuit. Such an individual would have to demonstrate that the purpose and character of the use, the nature of the infringed work, the amount of the work taken, and the effect on the market of the work support a fair use defense. However, the fair use defense in Fortnite’s case would be unlikely to succeed.

Assume Fortnite makes the “Ickey Shuffle” available as an emote. The “Ickey Shuffle” dance likely satisfies copyright’s requirements of originality, work of authorship, and fixation; it also is sufficiently expressive. The use would be commercial, as Fortnite would be profiting from the popular value of the dance as it has with other dances. Not only would the use be commercial, but it likely would not be transformative either. A parody in the context of end zone celebrations might be similar to when the Pittsburgh Steelers re-enacted an actual fight between Cincinnati Bengals wide receiver A.J. Green and Jacksonville Jaguars cornerback Jalen Ramsey<sup>213</sup>; however, it is rare and simply unlikely to occur. Transformative uses include more than just parody, but it is hard to imagine anything other than wholesale copying because Fortnite has

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213. See Sean Wagner-McGough, *Steelers Celebrate TD by Re-enacting A.J. Green’s Fight with Jalen Ramsey*, CBS SPORTS (Nov. 12, 2017, 5:04 PM), <https://www.cbssports.com/nfl/news/steelers-celebrate-td-by-re-enacting-a-j-greens-fight-with-jalen-ramsey/> (last visited Mar. 10, 2019).

already done so with the emotes. Therefore, Fortnite is unlikely to satisfy the first factor of the fair use test: the purpose and character of the use.

The nature of the copyrighted work, the second factor of fair use, also weighs against copyrightability, given that choreography is typically expressive. As discussed in the first factor, because the entire celebration is usually copied, the third factor—the amount copied—also weighs against fair use. Finally, Fortnite is unlikely to satisfy the fourth factor, market substitution of the original. Unlike a parody, an author could reasonably take advantage of a general market for his work—whether that is licensing use of it directly or licensing the right to create a derivative work. Because of this, even if the Fortnite emotes do not completely serve as a “market substitution” for the original dances, they still serve to take away the market for the creator’s creations.

When it comes to copyright law, the low probability of a fair use defense for end zone celebrations serves to bolster the strength of the copyright. However, this would only be relevant if a celebration were protectable in the first place. If Fortnite copies an end zone dance that does meet copyright law’s thresholds, then it would likely lose on a fair use defense.

## CONCLUSION

Considering the renewed freedom to celebrate touchdowns in the NFL, and given the present state of the Fortnite controversy, it remains to be seen whether Fortnite will copy the celebrations. End zone celebrations have become as much a part of our zeitgeist as the “Gangnam Style” and “Carlton” dances. Courts must strike a balance between avoiding unjust enrichment for those like Epic Games, and staying true to the goals and limits of copyright law. The public is harmed when a mere idea or simplistic expression is protected; on the other hand, when an author is denied copyright protection, the incentive to create disappears. This is especially true given Fortnite’s financial success.

As discussed, most end zone celebrations do not deserve copyright protection, but for the Copyright Office to bar them categorically goes too far. We could see Antonio Brown reveal an end zone dance so stunningly creative that fans’ jaws drop, only for the dance to be stolen by Fortnite. Maybe Brown and other football players will keep on dancing regardless. Or maybe we will see a new version of the “No Fun League.”