

A TALE OF TWO TIKTOK TITANS: EQUITABLE COPYRIGHT IN THE AGE OF SOCIAL MEDIA PLATFORMS

Abstract: Since the nation’s founding, copyright law has worked to strike a balance between incentivizing artistic creation and allowing such creations to circulate among the public. The Copyright Act of 1976 codified the prevalent common law doctrine aimed at this balance: fair use. Yet, fair use often fails to create clear expectations for how courts would likely find in specific cases. This doctrinal uncertainty is exacerbated when paired with the realities of online fan communities. The current interaction of copyright law with online communities sees copyright holders attempting negotiations themselves to define a satisfactory relationship with creators of fan adaptations of their work. There are few clear guidelines on how to accomplish such a feat clearly and fairly, however. In recent years, two notable copyright holders have attempted such extrajudicial agreements. First, Disney successfully facilitated the transition of a musical based on its 2007 film *Ratatouille* from a TikTok trend to multiple authorized performances that generated millions of dollars for charity. Second, Netflix struggled to negotiate a mutually beneficial deal with two TikTok creators who had composed a musical based on its hit television show *Bridgerton*, and eventually, the conflict drove the streaming giant to litigate the issue. This Note argues that given the uncertainty these two examples represent, particularly in the face of Netflix’s failed attempts at private ordering, it is time for copyright law to adapt to the modern age and expand the scope of implied licenses to allow consideration of partial acquiescence and laches in cases filed against online fan creators.

INTRODUCTION

“Never before has a musical been shaped by so many hands that didn’t originally sign a contract.”¹ A seemingly simple hook in an online article implicates complicated intellectual property questions.² Amidst the Broadway shutdown brought about by the COVID-19 pandemic, a TikTok user posted a

¹ Helen Shaw, *How Ratatouille: The TikTok Musical Came to Be (and Yes, Disney’s Okay with It)*, VULTURE (Dec. 31, 2020), <https://www.vulture.com/2020/12/how-ratatouille-the-tiktok-musical-came-to-be.html> [https://perma.cc/SF2D-CW32]. This quote refers to *Ratatouille: The TikTok Musical* (the “Ratatosical”), a musical based on Disney’s 2007 animated movie *Ratatouille* that was developed on TikTok by the collaboration of many online creators during the COVID-19 pandemic. *Id.*; see Eliana Dockterman, *How the Ratatouille Musical Went from TikTok Sensation to All-Star Broadway Production*, TIME, <https://time.com/5925560/ratatouille-tiktok-musical/> [https://perma.cc/RSP7-3GJF] (Dec. 31, 2020) (referring to “*Ratatouille: The TikTok Musical*” as the “Ratatosical”).

² Shaw, *supra* note 1; see Paige V. Gagliardi, *TikTok the Musical: Copyright Issues Raised by the “Ratatouille” Musical*, 17 WASH. J.L. TECH. & ARTS 147, 171 (2022) (arguing that the “Ratatosical” demonstrates how copyright’s fair use doctrine is no longer sufficient for modern realities).

short tune based on Disney's 2007 movie, *Ratatouille*.³ In an impressive feat of creative cooperation, TikTok accounts across the platform flocked to contribute novel aspects to the burgeoning musical.⁴ For the purposes of this Note, one account stands out among the rest: @disneyparks, Disney's official account for its theme parks.⁵ Indeed, *Ratatouille*'s copyright owner playfully contributed to a trend that scholars argue unfairly appropriates its own work.⁶ Had Disney chosen to litigate instead, the fans' only legal hope in the face of a lawsuit would have been a fair use defense, whose theoretical analysis yields an uncertain outcome.⁷

In reality, "Ratatouille: The TikTok Musical" (the "Ratatousical") successfully made the leap from being a casual pastime to an internet phenomenon with a full virtual performance and encore, selling over 200,000 tickets, and gaining approximately two million dollars in charity profits.⁸ In cooperating with and condoning the "Ratatousical," Disney may have set a dangerous precedent with potential harm to copyright holders and online fan creators alike.⁹

In 2022, singer Abigail Barlow and composer Emily Bear became the youngest-ever musical theater GRAMMY winners and the first to have won the award for a TikTok production.¹⁰ They won the award for their musical, "The Unofficial Bridgerton Musical," based on the hit Netflix series, *Bridger-*

³ Gagliardi, *supra* note 2, at 148; Emily Jacobsen (@e_jaccs), *A Love Ballad*, TIKTOK (Aug. 10, 2020), https://www.tiktok.com/@e_jaccs/video/6859521038418447622 [<https://perma.cc/V8RF-ZYKL>]. The video then went viral. Gagliardi, *supra* note 2, at 148.

⁴ Dockterman, *supra* note 1 (providing examples of creators who supplied new songs, choreography, stage mock-ups, and a Playbill to the trend using TikTok's "duet" feature). TikTok's duet feature allows creators to post their additional content or commentary directly alongside the original video. *Duets*, TIKTOK, <https://support.tiktok.com/en/using-tiktok/creating-videos/duets> [<https://perma.cc/QY86-QSXX>]. The lifecycle that a video has on the app is often unique, with videos experiencing cyclical phases of popularity, obscurity, and revival after creative collaborations. Dockterman, *supra* note 1.

⁵ @disneyparks, *Our Unofficial Audition for #ratatouillemusical*, TIKTOK (Nov. 20, 2020), <https://www.tiktok.com/@disneyparks/video/6897222815758535942> [<https://perma.cc/PG2W-AFXF>].

⁶ *Id.*; see Gagliardi, *supra* note 2, at 167 (arguing that although the musical creators might have a successful fair use defense claim if litigating an infringement action, three of the four factors in the analysis appear to weigh towards Disney).

⁷ See Gagliardi, *supra* note 2, at 154 (explaining that "the participatory consumption of entertainment" constitutes infringement of the derivative works right unless a fair use defense applies); *infra* notes 115–141 and accompanying text (explaining the fair use doctrine).

⁸ Gagliardi, *supra* note 2, at 156–57. The musical began with one TikTok user, who posted a short song based on the movie's main character, Remy. Dockterman, *supra* note 1. Eventually, a production company took only a few weeks to rework the online material into a full performance with famous actors such as Wayne Brady and Tituss Burgess. *Id.*

⁹ Gagliardi, *supra* note 2, at 159, 169–70.

¹⁰ Laura Wheatman Hill, *Why Bridgerton Fans Turned Against the Bridgerton Musical*, SLATE (Aug. 9, 2022), <https://slate.com/culture/2022/08/bridgerton-musical-lawsuit-netflix-tiktok-barlow-bear.html> [<https://perma.cc/4UFX-PT3U>]; see *The GRAMMYS: The 64th Annual GRAMMY Awards* (CBS television broadcast Apr. 3, 2022) (revealing Barlow and Bear as the winners for their category).

ton.¹¹ A large community formed around the pair as they crafted the musical, largely on the app, for six weeks.¹² Additionally, Barlow and Bear said the platform was essential to their process because it allowed for instant feedback from other accounts and removed barriers normally imposed on individuals trying to experience a musical production.¹³ Bear mentioned in an interview that the community's attention to their work stemmed directly from the success of the *Bridgerton* show.¹⁴ Undeniably, the immediate success of the Netflix series is hard to exaggerate.¹⁵

Meanwhile, Netflix and the duo attempted to arrange a mutually beneficial deal to protect the interests of all those involved.¹⁶ Eventually, Netflix sued Barlow and Bear for copyright infringement, among other counts.¹⁷ Although the suit may have come as a surprise to some fans of "The Unofficial Bridgerton Musical," many online creators and other fans spoke out against the apparent infringement of Netflix's rights.¹⁸ Critical to their opposition was that

¹¹ Hill, *supra* note 10; *see infra* note 15 and accompanying text (explaining the Netflix series' success). Barlow began her GRAMMY acceptance speech by reflecting upon the musical's surprising transformation from a TikTok video into a GRAMMY-winning piece in just one year. *The GRAMMYS*, *supra* note 10; *see* Abigail Barlow (@abigailbarlowww), TIKTOK (Jan. 10, 2021), <https://www.tiktok.com/@abigailbarlowww/video/6916241393144892677> [<https://perma.cc/WBP2-57V5>] (showing Barlow's original video asking the internet to imagine *Bridgerton* as a musical as she sang a clip of a song she had written to that purpose). During the acceptance speech, Barlow proceeded to thank anyone who followed the musical's evolution online and stated that they also merit credit for its success. *The GRAMMYS*, *supra* note 10. Barlow and Bear were nominated for "Best Musical Theater Album," some noted, because they faithfully translated the charm of Netflix's show into musical form by simultaneously using some of its exact expression while expanding on interesting aspects that the show neglected. Ailsa Chang, Cyrena Touros, Jonaki Mehta, & Christopher Intagliata, *Barlow & Bear Bring Musical Theater into the TikTok Era*, NPR (Mar. 18, 2022), <https://www.npr.org/2022/03/18/1084137553/bridgerton-grammys-nominees-awards-barlow-and-bear-music> [<https://perma.cc/R6M9-39RW>].

¹² Chang et al., *supra* note 11.

¹³ *Id.* Barlow explained in an interview that traditional theater productions are often prohibitively expensive for many people. *Id.* Bear agreed, explaining that many of the musical's fans had never before been exposed to musical theater. *Id.* TikTok was "indispensable" not only during the pair's creative process, but also because it provided a platform for the final work to accumulate a dedicated fanbase. *Id.*

¹⁴ *Id.*

¹⁵ *See* Nellie Andreeva, 'Bridgerton' Smashes Netflix Viewership Records to Become Streamer's Biggest Series Ever, DEADLINE (Jan. 27, 2021), <https://deadline.com/2021/01/bridgerton-netflix-viewership-record-biggest-series-ever-1234681242/> [<https://perma.cc/3RBP-EVMW>] (explaining that *Bridgerton* surpassed all of Netflix's estimates). The series broke Netflix's record for the number of accounts that viewed the show in its first twenty-eight days. *Id.* Eighty-two million accounts—forty-one percent of all Netflix subscribers at the time—did so, outranking the next-highest debut by six million accounts. *Id.*

¹⁶ *See infra* notes 170–177 and accompanying text (explaining the discussions and attempted negotiations between the parties).

¹⁷ Complaint at 20–24, Netflix Worldwide Ent., LLC v. Barlow, No. 22-cv-02247 (D.D.C. July 29, 2022).

¹⁸ Hill, *supra* note 10. The show's Executive Producer, Shonda Rhimes, and the underlying novels' author, Julia Quinn, both published statements that expressed pleasure toward fan-created deriva-

Barlow and Bear's fame and success made "The Unofficial Bridgerton Musical" a lucrative enterprise and would likely preclude a reasonable finding of fair use.¹⁹ Less than two months after filing its suit, Netflix voluntarily dismissed the case with prejudice, and "The Unofficial Bridgerton Musical" concert originally scheduled at the Royal Albert Hall in London was canceled.²⁰ As this Note will discuss in greater depth below, Netflix asserts that Barlow and Bear's refusal to compromise during informal discussions forced the company to defend its intellectual property in court.²¹

These examples in particular highlight a concerning future for copyright law: its inability to accommodate the widespread commercial and cultural success of fan-generated work on internet platforms, thus leaving copyright holders to contract around them.²² Though Disney came to a mutually beneficial, extrajudicial arrangement with the "Ratatousical" creators, Netflix was not so fortunate in its attempts.²³ In analyzing the similarities between their underlying situations and attempted solutions, it is evident that the Copyright Act in-

tive works that *do not* benefit commercially and emphasized the importance of creative protections. Logan Culwell-Block, *Shonda Rhimes, Julia Quinn Respond to Netflix's Unofficial Bridgerton Musical Lawsuit Against Barlow and Bear*, PLAYBILL (Aug. 1, 2022), <https://playbill.com/article/shonda-rhimes-julia-quinn-respond-to-netflixs-unofficial-bridgerton-musical-lawsuit-against-barlow-and-bear> [<https://perma.cc/9RWX-BJNJ>]. Perhaps these online statements swayed online opinion. See Hill, *supra* note 10 (suggesting that public opinion sided with Rhimes and Quinn following their passionate statements rather than with Netflix, a corporate entity). Netflix also provided a public statement:

Netflix supports fan-generated content, but Barlow & Bear have taken this many steps further, seeking to create multiple revenue streams for themselves without formal permission to utilize the Bridgerton IP . . . We've tried hard to work with Barlow & Bear, and they have refused to cooperate. The creators, cast, writers, and crew have poured their hearts and souls into Bridgerton, and we're taking action to protect their rights.

Emlyn Travis, *Netflix Drops Lawsuit Against The Unofficial Bridgerton Musical as Show's U.K. Performances Are Canceled*, ENT. WKLY. (Sept. 24, 2022), <https://ew.com/tv/netflix-drops-lawsuit-against-unofficial-bridgerton-musical> [<https://perma.cc/R42F-NBR7>].

¹⁹ See Complaint, *supra* note 17, at 17 (providing the ticket price Barlow and Bear set for a live performance of their musical); see also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561–62 (1985) (explaining that a defendant's commercial gain from copying a plaintiff's work is an important factor toward rejecting a fair use defense); Hill, *supra* note 10 (providing a statement from an online fan who implicitly questioned Barlow and Bear's potential success under fair use, arguing that "it's not a story of little people against big corporation, they literally sold out Kennedy Center not a high school musical in nowhereville").

²⁰ Notice of Voluntary Dismissal at 1, Netflix Worldwide Ent., LLC v. Barlow, No. 22-cv-02247 (D.D.C. Sept. 23, 2022) (showing that Netflix voluntarily dismissed its case on September 23, 2022, with prejudice); Travis, *supra* note 18; see Complaint, *supra* note 17, at 25 (showing that the lawsuit was filed July 29, 2022).

²¹ Complaint, *supra* note 17, at 13–18.

²² See *infra* notes 170–178 (describing Netflix's failed attempts to negotiate extrajudicially); *infra* notes 238–259 and accompanying text (arguing that Netflix attempted this extrajudicial negotiation because there was no bright-line rule in place).

²³ See *infra* notes 156–181 and accompanying text (comparing the two examples).

adequately guides these attempts at private ordering.²⁴ Without a change to the Copyright Act, uncertainty and misunderstanding could embolden infringers to convert copyrights into nothing more than empty protections.²⁵ Equally as concerning, these situations could lead to a disastrous regime of rapid, expansive litigation by powerful copyright holders against unassuming internet creatives.²⁶ If Disney's "Ratatousical" experiment acted as an omen for what could come in copyright, then Netflix's litigation against Barlow and Bear should signal the end of fair use's reign as the only applicable doctrine in this space.²⁷

Part I of this Note provides an explanation of copyright law and the factual underpinnings of the Disney and Netflix examples.²⁸ Specifically, Part I first examines copyright protection, infringement, and the fair use defense.²⁹ Then, it considers current online culture before delving into the factual backdrops of the "Ratatousical" and "The Unofficial Bridgerton Musical."³⁰ Part II discusses different perspectives on the derivative works right, criticisms of the fair use doctrine, and consent and laches in copyright analyses.³¹ Finally, Part III argues that a statutory amendment updating how copyright handles implied licenses and various forms of consent is the best approach because of the balance it strikes between the underlying purposes of copyright protection, the interests of original copyright owners, and those of fan communities on the internet.³²

I. THE CURRENT CONFINES OF COPYRIGHT LAW, RELEVANT ONLINE CONSIDERATIONS, AND TWO ILLUSTRATIVE EXAMPLES

The Constitution mandates protection of copyrightable material.³³ In 1984, in *Sony Corp. of America v. Universal City Studios, Inc.*, the U.S. Supreme Court explained that the Constitution provided for copyright protection in the name of public interest.³⁴ Although copyrighted works are protected

²⁴ Compare *infra* notes 156–161 (describing how the "Ratatousical" was made), with *infra* notes 162–181 (describing how Netflix and Barlow and Bear failed to reach a mutually beneficial arrangement for "The Unofficial Bridgerton Musical").

²⁵ Gagliardi, *supra* note 2, at 169–71.

²⁶ See *id.* at 169 (explaining that creators of user-generated content could encounter issues if this were to occur, regardless of how successful their work gets online).

²⁷ See *id.* at 171 ("Let [Disney] be a cautionary tale Should copyright law . . . not address the complications posed by new technologies and trending culture, copyright holders will have to work harder than ever to protect their intellectual property . . . [which] may be in vain due to the very precedent the largest copyright holders have set for themselves."); *infra* notes 156–181 and accompanying text (describing that Disney successfully traversed this situation, while Netflix struggled and was ultimately unsuccessful); notes 238–259 and accompanying text (arguing for a potential solution).

²⁸ See *infra* notes 33–181 and accompanying text.

²⁹ See *infra* notes 33–141 and accompanying text.

³⁰ See *infra* notes 142–181 and accompanying text.

³¹ See *infra* notes 182–237 and accompanying text.

³² See *infra* notes 238–259 and accompanying text.

³³ U.S. CONST. art. 1, § 8, cl. 8.

³⁴ 464 U.S. 417, 428–29 (1984).

stringently for a period of time, the Court reasoned that copyright law nevertheless serves public interest by incentivizing the creation of works that will eventually pass into the public domain.³⁵ The law strikes a balance between this public good and the economic interest or motivation of the owner, yet it is this eventual public good that ultimately guides copyright law and protection.³⁶

In 1976, Congress passed the modern iteration of the Copyright Act.³⁷ In doing so, the House Judiciary Committee noted that technological innovation had long been the impetus to amend the original 1790 Act.³⁸ It discussed how infringement became extensive while Congress struggled to update the Act for progressively modern technologies.³⁹ The Copyright Act of 1976 remains the “governing law” today but it has since undergone many amendments.⁴⁰ Notably, Congress passed the Digital Millennium Copyright Act in 1998, in part to accommodate the developing internet.⁴¹ Twenty years later, in 2018, Congress amended the Act with the Orrin G. Hatch-Bob Goodlatte Music Modernization Act.⁴²

³⁵ *Id.* at 429; see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (explaining that copyright functions, in conjunction with the free market, as a means to the end of “free expression”).

³⁶ *Sony*, 464 U.S. at 429 (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)) (delineating the limiting principles on the monopoly that copyright law may provide: namely, that it is not meant to be absolute and that is should predominantly serve the ultimate purpose of public enrichment). It is for this reason that copyright owners are given a “limited monopoly” in controlling their creative work. *Id.* The U.S. Supreme Court continues that the balance between incentivizing creative work and allowing such works to eventually belong to the public is particularly difficult to strike as new technologies emerge beyond what Congress explicitly planned for. *Id.* at 430–31. In such instances, the grounding principle of public good is the determining factor. *Id.* at 431–32 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

³⁷ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1511); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § A.01[A].

³⁸ H.R. REP. NO. 94-1476, at 47 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5660. It also noted that until the 1976 Act, there had been few updates since 1909 despite myriad technological advances. *Id.* Indeed, the report seemingly bemoans the arduous process of investigating proposed changes to the Act, as it prevented Congress from keeping up with technological demands. See *id.* at 47–48 (noting that an updated Act had been working its way through Congress for years but was stalled during the 90th Congress due to evolving technology, such as cable television, that had not been a consideration when the proposed changes were first drafted). In 1984, in *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court also highlighted the interplay in copyright law between technological advancement and congressional action. 464 U.S. at 430–31 (first quoting *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661–62 (1834); and then quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889)) (explaining that even marked technological innovation does not usurp Congress’s plenary authority to assign copyright protections and remedies).

³⁹ See, e.g., H.R. REP. NO. 94-1476, at 48 (discussing rising levels of audio copying that occurred while Congress waited to pass the bill).

⁴⁰ NIMMER & NIMMER, *supra* note 37, § A.01[A], [C].

⁴¹ David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 915–16 n.23 (2002); Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.).

⁴² NIMMER & NIMMER, *supra* note 37, § A.01[C][2]; Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (codified as amended in scattered sections of 17 U.S.C.). Congress passed the Music Modernization Act to combat the music industry’s favoring of

With constitutional and congressional intent as a backdrop, Section A of this Part explains copyrightability, the rights it affords, and the *prima facie* case for infringement.⁴³ Section B discusses the transfer of rights through licenses.⁴⁴ Section C explains the fair use defense.⁴⁵ Section D examines fan communities and user-generated content, and explains how TikTok excels even when compared to its social media giant peers.⁴⁶ Finally, Section E examines first how Disney successfully negotiated with the fan community to transition the “Ratatousical” from TikTok to virtual Broadway, and then how Netflix’s approach to “The Unofficial Bridgerton Musical” differs from Disney’s uncomplicated example.⁴⁷

A. Copyrightability and Copyright Law’s Protections, Particularly of Derivative Works

There are only two elements to a work’s copyrightability: fixation and originality.⁴⁸ The jurisprudence in this area purposefully does not contain novelty or aesthetic merit analyses.⁴⁹ Fixation simply refers to a work’s expression being secure and unchanging.⁵⁰ Originality, in turn, has two sub-elements: independent creation and some “modicum of creativity.”⁵¹ The Act then draws a

streaming giants such as Spotify at the expense of copyright holders, but the amendment falls short because it did not sufficiently account for the power imbalances between various industry actors. *See generally* Tanner J. Kramp, Note, *Rage Against the Machine: Why the Music Modernization Act Is but the First Step in Musicians’ Battle to Reclaim the Value of Their Works*, 64 B.C. L. REV. 219 (2023) (discussing the Act’s origins and arguing for three changes to it that would safeguard artist—compared to streaming company, record company, or publishing company—rights).

⁴³ *See infra* notes 48–80 and accompanying text.

⁴⁴ *See infra* notes 81–114 and accompanying text.

⁴⁵ *See infra* notes 115–141 and accompanying text.

⁴⁶ *See infra* notes 142–154 and accompanying text.

⁴⁷ *See infra* notes 156–181 and accompanying text.

⁴⁸ 17 U.S.C. § 102(a). Copyright protection explicitly applies to “works of authorship,” although this is a very broad term with eight non-exclusive categories delineated in the Act itself. *Id.* One of these categories would include a television show such as *Bridgerton*. *See id.* § 102(a)(6) (providing the category that includes “audiovisual works”); *id.* § 101 (defining “audiovisual works” broadly).

⁴⁹ H.R. REP. NO. 94-1476, at 51 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5664; *see* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (explaining that a judge’s perception of a work should not influence its copyrightability because the judge represents only a narrow opinion of a much broader public).

⁵⁰ 17 U.S.C. § 101 (requiring that a copyrighted work be capable of being perceived for an appreciable amount of time). This process can take place through any number of means, whether available at the time of enactment or invented later. H.R. REP. NO. 94-1476, at 52 (quoting 17 U.S.C. § 102(a)). Essentially, fixation requires a work to be “tangible,” whether literally or digitally. *See id.* at 53 (providing examples of fixation through both physical and digital means). Although not federally protected, non-fixed expressive works can fall within State protections. *Id.* at 52.

⁵¹ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citing *NIMMER & NIMMER*, *supra* note 37, § 2.01[A], [B]). Although the 1976 statute itself does not define originality, the legislature expressed desire that it be defined in a manner consistent previous court precedents under older versions of the statute. H.R. REP. NO. 94-1476, at 51. The first sub-element, independent creation, requires a lack of copying from a pre-existing work and must entail more than converting a pre-

bright line between expression and ideas: underlying ideas and related factual concepts are never copyrightable.⁵²

If a work is copyrightable, then it will be afforded a statutorily determined length of protection depending on the nature of the authorship.⁵³ A valid copyright owner is then afforded a “bundle” of exclusive rights that they may wield themselves, authorize another to partake in, or transfer entirely.⁵⁴ Such exclusive rights include the rights to create and circulate copies and create derivative works.⁵⁵

Derivative works are expressly protected under the Act as long as the derivative work’s author uses any preexisting expression lawfully.⁵⁶ A derivative work is a work “based upon” another such that it has been “recast, transformed, or adapted.”⁵⁷ In other words, derivative works are formed only from building upon elements that are themselves copyrightable and *then* adding ex-

existing work into a new medium without adding elements. NIMMER & NIMMER, *supra* note 37, § 2.01[A][1] (emphasizing that technical skill required to copy the material, even if difficult, is insufficient). The second sub-element, creativity, has an extremely low threshold. *Id.* § 2.01[B][1] (requiring only “distinguishable variation” from the original work (footnote omitted)); *Bleistein*, 188 U.S. at 250 (“[A] very modest grade of art has in it something irreducible, which is one man’s alone.”).

⁵² 17 U.S.C. § 102(b); *Feist Publ’ns, Inc.*, 499 U.S. at 344–45 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)) (explaining that copyright’s foundation rests on the principal that general ideas and specific facts are not protectable). Facts are not copyrightable because they are revealed rather than authored. *Feist Publ’ns, Inc.*, 499 U.S. at 347. In addition, this “idea/expression dichotomy” balances First Amendment communication rights with copyright’s expression protection. *Harper & Row*, 471 U.S. at 556. A useful example of the distinction between expression and underlying facts comes from the 1985 Supreme Court case, *Harper & Row, Publishers, Inc. v. Nation Enterprises*. *Id.* at 563 (explaining that although a historic autobiography’s facts were not protected from copying, the author’s “subjective descriptions” of notable people amounted to “individualized expression” that was protected against infringement).

⁵³ See 17 U.S.C. § 302(a), (c) (describing the length of copyright protection for a work with a known author and the different length of protection for works whose author is either unknown or is a company). When there is one author and the author’s identity is known, copyright protection lasts for that person’s lifetime plus seventy years. *Id.* § 302(a). If a work is authored anonymously, under a pseudonym, or as a work made for hire, then its protection lasts either for ninety-five years from publication or for 120 years after creation, whichever is shorter. *Id.* § 302(c).

⁵⁴ *Id.* § 106; H.R. REP. NO. 94-1476, at 61; 17 U.S.C. § 201(d) (pertaining to the transfer of copyright ownership).

⁵⁵ 17 U.S.C. § 106 (listing the derivative right in § 106(2)). The Act includes six categories of rights in total. *Id.*

⁵⁶ *Id.* § 103(a). If the incorporated material from the original expression is used lawfully, then the derivative work’s author is provided copyright protection for his or her new and additional expression. *Id.* § 103(b). Congress originally added protection for derivative works to the 1909 Copyright Act. Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 188 (2014).

⁵⁷ 17 U.S.C. § 101. The Act provides examples such as film versions, dramatizations, musical arrangements, and more. *Id.* The right to create derivative works is also called the adaptation right. 2 NIMMER & NIMMER, *supra* note 37, § 8.09. To infringe upon the derivative works right, the new work must contain some of the original’s expression and not merely utilize it as inspiration or comment upon it. H.R. REP. 94-1476, at 62.

pression.⁵⁸ There is no requirement that a derivative work improve upon the original in any subjective manner.⁵⁹ Nevertheless, more than trivial aspects must be added such that there is “distinguishable variation.”⁶⁰ The derivative works right, the right to create these pieces, intersects with the owner’s reproduction right but nonetheless exists independently because it encompasses a more extensive set of circumstances.⁶¹ Though this right is considered essential, it has been notoriously difficult to define.⁶²

If an individual creates a permissible derivative work, the copyright protection of the new work only extends to the new elements.⁶³ Furthermore, the protection of this new work in no way affects the protections of the original.⁶⁴ When someone different from the author of the original work creates the derivative, the parties must come to an understanding of their rights, or the ensuing work constitutes infringement.⁶⁵

⁵⁸ Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better Than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 802–03 (2013). Although this may appear to be obvious from the definition of a derivative work, one scholar highlighted this explicitly in his discussion of the right because it ties back into the foundational idea/expression dichotomy of copyrightability and further distinguishes the derivative works right from the reproduction right. *See id.* (using the example of a translation to distinguish these rights). This results in a clear rule: drawing inspiration from a work is not enough to make the resulting product a derivative. 2 NIMMER & NIMMER, *supra* note 37, § 8.09[A][1].

⁵⁹ NIMMER & NIMMER, *supra* note 37, § 3.03[A].

⁶⁰ *Id.* Examples of changes that courts found insufficient to create a derivative work include a small adjustment to a song’s underlying track and title and a change in a sculpture’s material and size. *Id.* In a case involving the editing of a historic text, a court found that it could not say as a matter of law that the changes and updates were not original. *Olivares v. Univ. of Chi.*, 213 F. Supp. 3d 757, 762, 769 (M.D.N.C. 2016). There, the modern author added punctuation and broke the work into paragraphs to make it more easily understood by modern readers. *Id.* at 769. The court found that a jury could reasonably conclude that such changes, although partially “mechanical,” require sufficient decision-making to satisfy the originality requirement. *Id.* In 1979, in *MGM, Inc. v. Showcase Atlanta Cooperative Productions*, the Northern District Court of Georgia explained that a stage-play version of the movie *Gone with the Wind* that did not critically comment on the underlying material through parody or satire would be a derivative work. 479 F. Supp. 351, 360 (N.D. Ga. 1979).

⁶¹ H.R. REP. NO. 94-1476, at 62. This distinction is important because a subsequent creator can infringe upon the derivative works right before fixation has occurred. *See id.* (giving the example of a derivative spontaneous performance as something that would infringe upon the derivative works right but not the reproduction right).

⁶² Gervais, *supra* note 58, at 786 (calling the derivative works right “lumpish and rather capacious”). This vague nature makes it hard for future creators to determine where the line that they cannot cross is. *Id.* at 786–87. This is markedly troublesome in the context of user-generated content online. *Id.* Because the derivative works right draws the line between permissible conduct—deriving inspiration from pre-existing works—and prohibited copying, its clarity is essential to outlining the most important boundaries of copyright protection in the modern technological age. *Id.* at 788.

⁶³ 17 U.S.C. § 103(b); NIMMER & NIMMER, *supra* note 37, § 3.04[A].

⁶⁴ 17 U.S.C. § 103(b); NIMMER & NIMMER, *supra* note 37, § 3.04[A].

⁶⁵ *Brownstein v. Lindsay*, 742 F.3d 55, 68 (3d Cir. 2014) (citing NIMMER & NIMMER, *supra* note 37, § 3.04); *see infra* notes 90–102 and accompanying text (explaining the division and transfer of rights through exclusive or implied licenses).

Congress instituted a three-year statute of limitations on all civil copyright infringement claims.⁶⁶ When filing within those three years, plaintiffs must prove two elements of direct infringement: actual copying and substantial similarity.⁶⁷ Upon prevailing, a plaintiff can obtain a variety of remedies: injunction; the seizure or destruction of the infringing property; damages and profits, either actual or statutorily designated; and fees.⁶⁸

As copying is very easy for plaintiffs to prove, it is prudent to focus on courts' analysis of substantial similarity.⁶⁹ Commonly, this analysis amounts to determining whether copying small portions of a large text establishes substantial similarity.⁷⁰ Additionally, there is no substantial similarity where the defendant copied only aspects of the plaintiff's work unprotected by copyright, such as ideas.⁷¹ That being said, literally copying text is not the only way for two works to be deemed substantially similar.⁷² The ultimate question for

⁶⁶ 17 U.S.C. § 507(b). The three years traditionally begin when the infringement itself occurs or when the plaintiff had actual knowledge, or would have with reasonable diligence, of the infringement. *Petrella v. MGM*, 572 U.S. 663, 670 (2014). If the defendant began infringing further in the past but continued, the newer instances of infringement represent new three-year periods, and can be litigated even if the earlier infringement never was. *Id.* at 671–72.

⁶⁷ *TMTV, Corp. v. Mass Prods.*, 645 F.3d 464, 470 (1st Cir. 2011) (citing *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 60 (1st Cir. 2000)). Both elements are issues of fact. *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946), *abrogated on other grounds, as recognized in Heyman v. Com. & Indus. Ins. Co.*, 524 F.2d 1317 (2d Cir. 1975). Plaintiffs can prove copying using either direct or indirect evidence. *Segrets, Inc.*, 207 F.3d at 60. Direct evidence entails the defendant's acknowledgement of the copying. *Arnstein*, 154 F.2d at 468. Indirect proof relies on an interplay of the defendant's access to the original work and the ultimate similarity of the two works. *Id.*

⁶⁸ 17 U.S.C. §§ 502–505.

⁶⁹ *See, e.g., TMTV*, 645 F.3d at 470 (declaring that there was no need to analyze copying and instead turning the focus entirely to substantial similarity). This prong of the analysis is sometimes referred to as “illicit copying” or “unlawful appropriation,” denoting that copying itself cannot be enough to hold a defendant liable. *See Arnstein*, 154 F.2d at 468, 472 (distinguishing “illicit copying” from “permissible copying”). Though the analysis for substantial similarity can often appear to overlap with that of originality, an important distinction exists in that a small change rendering a new work original may still be too insignificant to avoid the issue of substantial similarity. *Dam Things from Den. v. Russ Berrie & Co.*, 290 F.3d 548, 565 (3d Cir. 2002); 4 *NIMMER & NIMMER*, *supra* note 37, § 13.03[A].

⁷⁰ *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (describing this in the context of plays). Though not explicitly discussed in cases, this is often called “fragmented literal similarity.” 4 *NIMMER & NIMMER*, *supra* note 37, § 13.03[A]. It is easy to conflate this analysis with that of the fair use doctrine, discussed below. *Id.* § 13.03[A][2][a]; *see infra* notes 115–141 and accompanying text (explaining the fair use doctrine). The issue ultimately examines the proportion of the plaintiff's work that the defendant allegedly took, not the proportion it represents in the defendant's work. 4 *NIMMER & NIMMER*, *supra* note 37, § 13.03[A][2][a]. This analysis can also examine the qualitative value of the copied material to the plaintiff's work. *Id.*

⁷¹ *TMTV*, 645 F.3d at 470; 4 *NIMMER & NIMMER*, *supra* note 37, § 13.03[A].

⁷² *TMTV*, 645 F.3d at 470. In 2011 in *TMTV, Corp. v. Mass Productions*, the First Circuit Court of Appeals held that two television programs with nearly identical locations, characters, dynamics, atmospheres, styles, and cinematography were substantially similar notwithstanding minor differences in set design, dialogue, and character traits. *Id.* at 471 (quoting *TMTV, Corp. v. Mass Prods.*, 345 F. Supp. 2d 196, 213 (D.P.R. 2004), *aff'd*, 645 F.3d 464). If a defendant copies “wholesale the entire

courts then becomes where to draw this line of substantial similarity where the copying is of the more abstract creative content of the original piece rather than portions of the actual text.⁷³

In 1930, in *Nichols v. Universal Pictures Corp.*, the Second Circuit Court of Appeals discussed the difficulty in this analysis where abstract concepts, although not merely the unprotected underlying ideas, were taken without copying any text explicitly.⁷⁴ In that case, about two plays revolving around similar ethnic and family dynamics, the Court admitted that these scenarios will never result in a bright-line rule.⁷⁵ Given that these analyses are deeply fact-based, it also lamented that direct analogies to past cases and their courts' reasoning can offer little help to a new analysis.⁷⁶

Furthermore, courts have not settled the issue of analyzing alleged infringement when two works are in different mediums.⁷⁷ Though courts aim to avoid including the natural differences that occur as a result of changing mediums in their analyses, there is no clear rule or method in place to do so faithfully.⁷⁸ This is due, in part, to the fact that the copyright infringement analysis developed prior to the existence of the derivative right.⁷⁹ Essentially, the substantial similarity test is ill-suited for analyses when the works involve different mediums.⁸⁰

backdrop, characters, inter-relationships, genre, and plot design" of a plaintiff's work, it infringes upon the original even if it does not take any particular written expression. *Id.* at 470. Although not a judicial concept, understanding this type of scenario as "comprehensive nonliteral similarity" is helpful in distinguishing from examples of literal similarity where a copier takes the expression itself. 4 NIMMER & NIMMER, *supra* note 37, § 13.03[A]. This type of infringement lies at the heart of the idea/expression dichotomy and can entail a variety of tests. *Id.* § 13.03[A][1] (explaining different approaches to differentiating an idea from its expression: the abstractions test, the pattern test, "total concept and feel," and others).

⁷³ *Nichols*, 45 F.2d at 121.

⁷⁴ *Id.*

⁷⁵ *Id.* at 120–21 (explaining that although parties can define the creative nature of a work at varying levels of abstraction, eventually that nature is too commonplace to protect, and this point is undefinable for the purpose of constructing a consistent rule). Later in his analysis, Judge Learned Hand emphasized that such difficulty in line drawing cannot excuse courts from doing so. *Id.* at 122. Ultimately, Judge Hand determined that the plays were not substantially similar. *Id.* The similarities between the plays—namely, that they were both about a marriage causing a familial rift over ethnic differences that the families had to overcome—were not sufficiently specific to meet the test. *Id.* He continued to explain that when an author creates a work, such as the original play in that case, a portion of it automatically enters the public domain: the underlying idea. *Id.* (explaining that the general concept of the original play's plot would warrant no more protection than that of a Shakespeare play).

⁷⁶ *Id.* at 121 (citing *Fendler v. Morosco*, 171 N.E. 56, 60 (N.Y. 1930)).

⁷⁷ Douglas C. Rennie, *This Book Is a Movie: The Faithful Adaptation as a Benchmark for Analyzing the Substantial Similarity of Works in Different Media*, 93 OR. L. REV. 49, 50–51 (2014).

⁷⁸ *Id.* at 51.

⁷⁹ *Id.* at 71.

⁸⁰ *Id.* at 71–76. One scholar suggests adopting a "faithful adaptation" test to solve this problem *Id.* at 79–90. This approach would consist first of two steps: (1) the likelihood that the original creator would have actually considered utilizing the market in which the derivative work finds itself and (2) how some-

*B. Transferring, Dividing, and Sharing Copyrights: Explicit
and Implied Licenses to Avoid Infringement Claims*

Copyrights originally belong to a work's author upon the work's creation.⁸¹ The copyright owner gets an entire "bundle" of copyrights and can choose to transfer any particular right, or a subdivision thereof, using licenses.⁸² Subsection 1 of this Section discusses the more common forms of copyright licenses: explicit licenses.⁸³ Subsection 2 addresses the complicated ways in which one can obtain an implied license.⁸⁴ Subsection 3 contrasts implied licenses with traditional equitable defenses.⁸⁵

1. Explicit Licenses: Compulsory and Exclusive

Certain sections of the Copyright Act utilize compulsory licenses, which do not require consent—affirmative or implied—from the copyright holder.⁸⁶ When such compulsory licenses are applicable to a particular use or industry, copyright owners cannot preclude the use that Congress statutorily prescribed.⁸⁷ Traditionally, their purpose is to avoid monopolies and allow the distribution of copyrighted works following technological advancement.⁸⁸ Utilizing a compulsory license requires that the user pay the copyright holder a predetermined license fee.⁸⁹

A copyright holder can also choose to transfer a right provided by the Act to others using an exclusive license.⁹⁰ The recipient of an exclusive license assumes ownership of the work for that particular use, precluding its use in that way by all others.⁹¹ Although this power is certainly robust, it can apply to

one attempting to create an adaptation for that market would do so, including what expression they would use and how they would translate it between the two specific mediums at hand. *Id.* at 88. Then, the court would analyze whether there was substantial similarity between the original work, as it would be faithfully adapted into the new medium, and the defendant's work in that medium. *Id.* at 82.

⁸¹ 17 U.S.C. § 201(a); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985).

⁸² 17 U.S.C. § 201(d); H.R. REP. NO. 94-1476, at 61 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5674; *see* 17 U.S.C. § 101 (defining "copyright owner" as the owner of any given right included in the bundle rather than the original author or some owner of the bundle as a whole).

⁸³ *See infra* notes 86–95 and accompanying text.

⁸⁴ *See infra* notes 96–102 and accompanying text.

⁸⁵ *See infra* notes 103–114 and accompanying text.

⁸⁶ Christopher M. Newman, "What Exactly Are You Implying?": *The Elusive Nature of the Implied Copyright License*, 32 CARDOZO ARTS & ENT. L.J. 501, 526–27 (2014); *see, e.g.*, 17 U.S.C. § 119 (providing examples of compulsory licenses for secondary transmissions of certain television shows disseminated using satellites).

⁸⁷ Newman, *supra* note 86, at 526.

⁸⁸ *Id.* at 527. Compulsory licenses function essentially as the antithesis of private ordering between parties. *Id.*

⁸⁹ *See id.* at 526 (describing such a fee in the context of the emblematic "cover version" license).

⁹⁰ 3 NIMMER & NIMMER, *supra* note 37, § 10.02[A].

⁹¹ *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996); *see John Wiley & Sons, Inc. v. DRK Photo*, 998 F. Supp. 2d 262, 277 (S.D.N.Y. 2014) (quoting *Davis v. Blige*, 505 F.3d 90, 99 (2d Cir.

a very narrow subcategory of the original right.⁹² For example, a licensee can obtain a specific, but exclusive, license to print a hardcover version of a copyright owner's book, but not a paperback or any other printed version.⁹³ The transfer of an exclusive right must occur through a written contract.⁹⁴ If an infringer copies protected expression initially from the licensor's work—regardless of whether the infringer found that expression in the original or the licensee's derivative work made under an exclusive license—there are two scenarios that dictate who can sue.⁹⁵

2. Implied Licenses: When the Copyright Holder's Conduct Protects the Alleged Infringer

Unlike an exclusive license, a nonexclusive license does not confer ownership rights but allows the licensee to utilize the copyrighted work in a specific way.⁹⁶ In contrast to the strict guidelines imposed in the Act for how one secures an exclusive license, the Act remains silent on how nonexclusive licenses can or cannot be granted.⁹⁷ An oral agreement or even conduct implying the existence of an understanding is enough to grant a nonexclusive license.⁹⁸ The state of the law across circuits on what constitutes an implied license,

2007)) (explaining that when licensees are given exclusive licenses, their rights supersede those of the original copyright owner), *aff'd*, 882 F.3d 394 (2d Cir. 2018).

⁹² 3 NIMMER & NIMMER, *supra* note 37, § 10.02[A].

⁹³ *Id.* In that example, the licensee could sue anyone who printed a hardcover copy but could not sue if someone printed a portion of the book in a newspaper. *Id.*

⁹⁴ 17 U.S.C. § 204(a). The purpose of the written contract is reliability an unambiguousness. *I.A.E., Inc.*, 74 F.3d at 775 (quoting *Effects Assocs. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990)). The creation of a lawful derivative work does not automatically create an exclusive license to the original's expression. 17 U.S.C. § 103(b).

⁹⁵ NIMMER & NIMMER, *supra* note 37, § 3.05. The crux of the first scenario is that the unlawful copier *must* infringe on this expression using the medium over which the licensee has control. *Id.* In that case, only the licensee has standing to sue, as the original author relinquished those rights during the licensing process. *Id.* In the second situation, where the infringer uses a different medium to unlawfully copy, then only the original author, and not the licensee derivative work author, has the right to sue. *Id.*

⁹⁶ *I.A.E., Inc.*, 74 F.3d at 775. A nonexclusive license simply prohibits suit against the licensee for an infringement claim, and thus a nonexclusive licensee cannot sue for copyright infringement of the work. *Id.*; 3 NIMMER & NIMMER, *supra* note 37, § 10.03[A][7] (explaining that a nonexclusive licensee has no standing to sue others who may copy the original work, so the licensee can never claim a breach of their license by such copying); *see Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 32 (2d Cir. 1982) (explaining that only an original author, who is thus the copyright owner, or a licensee with an exclusive license can sue for alleged infringement), *superseded on other grounds by* FED. R. CIV. P. 52(a). The author of a derivative work that was granted a nonexclusive license has no right to sue for any infringement of the original author's underlying expression, regardless of which work the infringer copied from. NIMMER & NIMMER, *supra* note 37, § 3.05.

⁹⁷ Newman, *supra* note 86, at 507.

⁹⁸ 3 NIMMER & NIMMER, *supra* note 37, § 10.03[A][7].

however, is convoluted and unsettled.⁹⁹ Many courts follow a very particular and narrowly defined “request, delivery, and intent” framework developed by the Ninth Circuit Court of Appeals, with various levels of leniency.¹⁰⁰ Some courts focus more on intent, while others remain stringent in requiring the three Ninth Circuit elements.¹⁰¹ Ultimately, what an implied license is or should be in the copyright context is expansive given the array of jurisprudence across different circuits.¹⁰²

3. What Implied Licenses Are Not: Estoppel, Laches, and Acquiescence

Copyright law does not currently consider a copyright holder’s non-enforcement of his or her rights in infringement analyses, and thus equitable defenses often fail to protect defendants.¹⁰³ Tolerated use—when the copyright owner knows of the infringement but makes no effort to terminate the use, also known as acquiescence—is legally distinct from an implied license.¹⁰⁴ Generally, only the copyright holder’s affirmative consent authorizes a use of the under-

⁹⁹ Newman, *supra* note 86, at 502 (explaining that there is no coherent way to summarize different courts’ definition and scope of implied copyright licenses); see Baker v. Weber, No. 19-1093, 2021 WL 4480998, at *9 (S.D.N.Y. Sept. 30, 2021) (explaining that *Effects Associates v. Cohen* did not provide insight into how implied licenses could arise from facts outside of the employment context but that the Second Circuit has not limited implied licenses to those narrow set of facts).

¹⁰⁰ See Photographic Illustrators Corp. v. Orgill, Inc., 953 F.3d 56, 61–62 (1st Cir. 2020) (boiling the test down to its three basic elements: “request, delivery, and intent”); accord Nelson-Salabes, Inc. v. Morningside Dev., LLC, 284 F.3d 505, 514–15 (4th Cir. 2002) (explaining that *Effects Associates* established a three-part test to determine whether conduct rises to the level of an implied license that is often followed, to some degree, by other circuits (quoting *I.A.E., Inc.*, 74 F.3d at 776)). Using the original test, an implied license exists only if someone asks a copyright owner to make a work, the copyright owner does so and gives it to the requesting party, in doing so intending for the requesting party to copy and disseminate it. *Nelson-Salabes, Inc.*, 284 F.3d at 514 (citing *I.A.E., Inc.*, 74 F.3d at 776). A specific example of what is likely an implied license under this test is an online news agency providing a method for readers to share its articles with others. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008).

¹⁰¹ See *Photographic Illustrators Corp.*, 953 F.3d at 61–62 (comparing the First Circuit’s more “general” approach—focusing on the copyright holder’s intent—to the formulaic approach of the Second and Seventh Circuits—requiring all three elements—and the trend of the Fifth and Ninth Circuits—adhering only loosely to the test).

¹⁰² See *id.* at 61 (explaining that although a common law sense of implied license would focus on any apparent “conduct short of any magic words of assent,” certain courts require specific evidence to find the existence of an implied license).

¹⁰³ See Kevin J. Hickey, *Consent, User Reliance, and Fair Use*, 16 YALE J.L. & TECH. 397, 410–12 (2014) (providing a case exemplifying this prevailing view where the court refused to consider the plaintiff’s knowledge, assent, and participation in the defendant’s infringement within a fair use defense); Wu, *supra* note 100, at 619–20 (explaining how acquiescence and laches are distinct from implied licenses). In addition, implied licenses themselves are not equitable in nature. *Effects Associates*, 908 F.2d at 559 n.7.

¹⁰⁴ Wu, *supra* note 100, at 619–20.

lying work.¹⁰⁵ Thus, relying on acquiescence leaves the potential defendant considerably exposed to liability if the copyright owner chooses to litigate.¹⁰⁶

This concept of tolerated use is associated with that of laches.¹⁰⁷ Laches, a delay in a lawsuit that leads to prejudice for the defendant, is currently an unsuccessful defense in copyright lawsuits, although it is listed as a possible affirmative defense to civil actions in the Federal Rules of Civil Procedure.¹⁰⁸ Equity courts originally developed the doctrine of laches to help guide them in cases without statutes of limitations.¹⁰⁹ Since, courts have incorporated the defense into cases already governed by statutes of limitations, though no longer do so in copyright cases.¹¹⁰

Unlike laches and tolerated use more generally, equitable estoppel is still considered a valid defense in specific copyright cases.¹¹¹ Equitable estoppel, sometimes referred to as estoppel by conduct, pertains to situations where the copyright holder misleads the eventual defendant, and the defendant is there-

¹⁰⁵ Hickey, *supra* note 103, at 398 (explaining that courts do not differentiate between anything shy of affirmative consent in copyright cases).

¹⁰⁶ See Wu, *supra* note 100, at 619–20 (comparing how a defendant would claim and prove an implied license versus the defense, if available, that the defendant could try when alleging tolerated use). In fact, there have not been enough cases to actually delineate the difference between tolerated copying and copying that falls under fair use. *Id.*; see Hickey, *supra* note 103, at 427 (contending that a copyright holder's tolerance of infringing use is relevant to the fourth factor in a fair use analysis because it implies the copyright holder does not consider the infringing work a threat to its own position in the market). Acquiescence is “[a] person’s tacit or passive acceptance; implied consent to an act.” *Acquiescence*, BLACK’S LAW DICTIONARY (11th ed. 2019). Acquiescence is associated with the incidental and regular infringement that naturally occurs in people’s day-to-day lives by the nature of our society. Wu, *supra* note 100, at 617–18 (explaining that acquiescence often occurs when copying results in repeated uses that are not individually lucrative and providing social media as an example).

¹⁰⁷ See Wu, *supra* note 100, at 619–20 (explaining that a possible defense in a tolerated use situation would be laches).

¹⁰⁸ JAY DRATLER, JR., LICENSING OF INTELLECTUAL PROPERTY § 3.05 (2021); *Petrella v. MGM*, 572 U.S. 663, 677 (2014) (holding that because the Copyright Act provided for potential delay when it enacted a three-year statute of limitations, laches was not a valid defense to copyright infringement); see FED. R. CIV. P. 8(c) (listing laches as an affirmative defense in civil cases); *Laches*, BLACK’S LAW DICTIONARY, *supra* note 106 (defining laches as “[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought” and, more colloquially, as “sleeping on rights”). The Court did leave the door for laches in copyright slightly cracked, however, in its 2014 case *Petrella v. MGM* when it mentioned, without overruling, two copyright cases utilizing the laches defense, differentiating them as “extraordinary” and requiring exception. 572 U.S. at 685–86 (discussing *Chirco v. Crosswinds Communities, Inc.* and *Era Publications International v. Henry Holt & Co.*).

¹⁰⁹ *Petrella*, 572 U.S. at 678.

¹¹⁰ *Id.* at 677 (holding that laches is not applicable in a copyright context); *id.* at 694 (Breyer, J., dissenting) (explaining that courts have used laches in cases with statutes of limitations).

¹¹¹ See *id.* at 684–85 (majority opinion) (emphasizing that equitable estoppel remains a valid defense because it is not a displacement of Congressional intent, as codified in the statute of limitations, like a laches defense is, but rather focuses on the bad intent of the copyright holder).

fore prejudiced.¹¹² There can be overlap between equitable estoppel and laches, in that equitable estoppel cases can include delays, but that defense does not require it like laches does.¹¹³ Essentially, one can consider equitable estoppel a defense against fraud.¹¹⁴

C. Fair Use: Currently a Defendant's Most Useful Defense Against an Infringement Claim

Currently, if a copyright holder can prove a fan infringed upon any of its copyrights, the only recourse available to the fan is to argue a fair use defense.¹¹⁵ This defense acts as one of the statutory exceptions to copyright protection and can apply to a variety of uses.¹¹⁶ Additionally, the Act includes four non-exclusive factors to apply in each fair use analysis.¹¹⁷ Subsection 1 of this Section explains what this highly fact-dependent analysis entails.¹¹⁸ Subsection 2 examines how courts wield this analysis in particular circumstances.¹¹⁹

1. Fair Use Analysis, Generally

Fair use was originally a judge-created doctrine later codified in the Copyright Act of 1976.¹²⁰ In 1841, in *Folsom v. Marsh*, Justice Joseph Story of the Massachusetts Federal District Court explained the doctrine as it had been developed in various cases.¹²¹ Then, the drafters of the Act used much of the

¹¹² *Id.* at 684; *Estoppel*, BLACK'S LAW DICTIONARY, *supra* note 106. This has five elements amounting to a knowing or negligent inducement that the other party reasonably acted upon to its detriment. *See Estoppel*, *supra* note 106 (listing the five elements).

¹¹³ *Petrella*, 572 U.S. at 684–85.

¹¹⁴ *Estoppel*, *supra* note 112.

¹¹⁵ *See* Gagliardi, *supra* note 2, at 154 (explaining that current copyright doctrine limits the “participatory consumption of entertainment” to being infringing or else acceptable conduct only under the fair use defense).

¹¹⁶ 17 U.S.C. § 107 (including, a non-exclusive list of uses that could reasonably fall under the fair use defense, such as media presentations and schooling); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 n.2 (1985).

¹¹⁷ 17 U.S.C. § 107; *see infra* notes 120–130 and accompanying text (explaining the four factors).

¹¹⁸ *See infra* notes 120–130 and accompanying text.

¹¹⁹ *See infra* notes 131–141 and accompanying text.

¹²⁰ *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994); H.R. REP. NO. 94-1476, at 61 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5678; *see* 17 U.S.C. § 107 (codifying the fair use doctrine). The House Judiciary Committee also described fair use as a paramount and historical check on copyright holders’ extensive exclusive power. H.R. REP. NO. 94-1476, at 65.

¹²¹ *Folsom v. Marsh*, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841) (explaining that courts must “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work”); *Campbell*, 510 U.S. at 576 (explaining that Justice Story extracted and synthesized the components of the fair use defense from various other cases).

same language in the doctrine's codification.¹²² Despite its codification, the fair use doctrine eschews explicit rules.¹²³ Nonetheless, Section 107 of the Act clarified Justice Story's explanation of the doctrine by explicitly separating the analysis into four factors a court "shall include" in its analysis.¹²⁴

The first factor is the "purpose and character of the use," and one consideration is whether the new work is commercial.¹²⁵ This factor boils down to how "transformative" the allegedly infringing work is.¹²⁶ The second factor is the "nature" of the original work.¹²⁷ The third factor is the "amount and substan-

¹²² *Campbell*, 510 U.S. at 576 (explaining that fair use was a common law defense before the Copyright Act of 1976 and highlighting that the Act reflects Justice Story's characterization of the defense); see 17 U.S.C. § 107 (codifying the defense).

¹²³ *Campbell*, 510 U.S. at 577; see H.R. REP. NO. 94-1476, at 65 (explaining that there is no one definition of fair use because of its equitable nature and that each fair use analysis is a fact-specific endeavor).

¹²⁴ See 17 U.S.C. § 107 (separating and including the four factors). These four factors are not exclusive within the analysis but represent its floor. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985).

¹²⁵ 17 U.S.C. § 107. In *Harper & Row*, the Court explained that even news reporting, which is explicitly mentioned in § 107 of the Act as a likely non-infringing use of copyrighted material, requires an analysis of whether the defendant stood to commercially gain without fairly compensating the original author. 471 U.S. at 561–62. "Financial gain" is defined in the statute to include either receiving, or even predicting that one will receive, "anything of value." 17 U.S.C. § 101. When the *Harper & Row* Court determined the factor favored the plaintiff, it emphasized the defendant's intention to "scoop[]" the newsworthy story from another publication and undermine the author's interest in having a unique and timely story. 471 U.S. at 561–62. In 1994, in *Campbell v. Acuff-Rose Music, Inc.*, the Court admonished the lower court that considered the commercial nature of a new work dispositive. 510 U.S. at 584. It clarified that this is only one sub-element within the first factor to determine the work's purpose. *Id.*

¹²⁶ *Campbell*, 510 U.S. at 579 (explaining that the primary purpose of the first factor is to analyze if the new work would impermissibly displace the original or if, instead, it creates a "further purpose or different character, altering the first with new expression, meaning, or message"); see *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021) (quoting *Campbell*, 510 U.S. at 579) (explaining that the useful question is whether the new work is "transformative" based on the quality of additional elements the copier added). Parodies function to critically comment upon an original work and thus get to the heart of this analysis, as copying the original proves necessary for a parody's purpose. *Campbell*, 510 U.S. at 579–80; see *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 452–53 (9th Cir. 2020) (providing an example of a derivative work that did not constitute a parody because it did not sufficiently critique the original when using its distinctive style). A new work does not have to be a parody, or even make a statement about the original work in any way, to be protected under fair use, however. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). In fact, in 2014, the Second Circuit Court of Appeals held that a searchable database that required the exact copying of entire texts was transformative because the purpose of searching for a word within all of the texts is sufficiently different from that of writing the original texts. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014).

¹²⁷ 17 U.S.C. § 107. This factor considers how factual versus fictional a work is and affords it protection accordingly, with fictional, creative works receiving a presumption of more protection. *Harper & Row*, 471 U.S. at 563; *Campbell*, 510 U.S. at 586 (explaining that fictional works strike closer to copyright's constitutional purpose than factual ones, and thus defendants will experience more difficulty claiming a fair use defense when copying them).

tiality” of the material the defendant used from the original work.¹²⁸ Finally, the fourth factor analyzes the market effects on the original work and any effects the potentially infringing work may have on its value.¹²⁹ Put simply, this factor analyzes to what extent there may be a “harm of market substitution.”¹³⁰

2. Fair Use Analysis in Context

Like infringement analyses more generally, fair use analyses are difficult to predict.¹³¹ Courts have conducted fair use analyses in cases where the allegedly infringing work claims a parodic purpose.¹³² Other courts have examined

¹²⁸ 17 U.S.C. § 107. In *Harper & Row*, the Court focused not on the conciseness of the language the defendant took, but instead underscored the impermissibility of taking “what was essentially the heart” of the original work. 471 U.S. at 564–65 (quoting *Harper & Row, Publishers v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y.), *rev’d*, 723 F.2d 195 (2d Cir. 1983), *rev’d*, 471 U.S. 539 (1985)). Thus, the copying in that case was qualitatively substantial according to the Court. *Id.* at 565. This factor also focuses on what was taken from the original work rather than how it is incorporated into the new work. *Id.* In other words, leaving portions of the original work uncopied does not favor a defendant who otherwise admits to copying substantial portions of the work. *Id.* (quoting *Sheldon v. Metro-Goldwyn Pictures, Corp.*, 81 F.2d 49, 56 (2d Cir. 1936)). The purpose of the work determined in factor one heavily influences this analysis. *Campbell*, 510 U.S. at 586–87. Then, the outcome of this analysis in turn influences the fourth factor. *Id.* at 587.

¹²⁹ 17 U.S.C. § 107. This is considered the principal factor. *E.g.*, *Harper & Row*, 471 U.S. at 566. Additionally, the analysis relates even to *potential* markets the original copyright owner may wish to enter using derivative works or markets in which it could provide licenses to others. *Id.* at 568; *Campbell*, 510 U.S. at 592; *see Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009) (confirming that this concept is relevant even when the original author has demonstrated no intention to create or license derivative works), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010).

In other words, it does not matter in which medium the original work or potentially infringing work appears for this factor. *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (holding that the original work being a sculpture and the derivative being a photograph was not dispositive of this analysis); *see* 4 NIMMER & NIMMER, *supra* note 37, § 13.05[B] (footnote omitted) (explaining that interfering with the derivative work’s right, even if the owner has not already themselves utilized that right, precludes the fair use defense).

Furthermore, the transformativeness of a work is inversely related to a court’s finding of actionable market harm. *Campbell*, 510 U.S. at 591. This is because the new work is unlikely to replace the original in its market. *Authors Guild*, 755 F.3d at 99. Additionally, there is no market harm for the purpose of this factor if successful criticism of the original harms its popularity or revenue. *Campbell*, 510 U.S. at 592.

¹³⁰ *Campbell*, 510 U.S. at 593.

¹³¹ *See* Deidré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 518–20 (2012) (comparing two fair use analyses with similar underlying facts that courts decided differently); *supra* notes 75–80 and accompanying text (describing the uncertainty in copyright infringement analyses).

¹³² *See, e.g.*, *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269–76 (11th Cir. 2001) (examining the fair use defense for a parodic book, *The Wind Done Gone*, based on *Gone with the Wind*). In 2001, in *SunTrust Bank v. Houghton Mifflin*, the Eleventh Circuit Court of Appeals explained that each factor of the fair use analysis was somehow altered when the secondary work at issue was parodic in nature. *Id.* The analysis of the second factor, for instance, is relegated to near obscurity because parodies, by their nature, copy highly expressive, artistic works. *Id.* at 1271. The *SunTrust* court ultimately held in favor of the defendant’s fair use defense. *Id.* at 1277.

whether producing and commercializing a secondary work that helps fan communities remember and organize details from long-running original works constitutes fair use.¹³³ Elsewhere, a court analyzed the legality of a fan crowdsourcing funds to create a movie based on a popular series.¹³⁴

In 2021, in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, the Second Circuit Court of Appeals held that the defendant did not have a valid fair use defense.¹³⁵ In doing so, it clarified the purpose of transformation in fair use analyses.¹³⁶ The court held that too broad a definition of transformation, as the district court had used, would cause fair use protection to “crowd[] out” the derivative works right.¹³⁷ In lieu of focusing on the inclusion of additional elements to the original work, the court approached the issue of transformation by comparing the “purpose and character” of the two works.¹³⁸ Ultimately, the court reasoned that in cases where the new work does not comment upon the original, the new work must entirely transform its “artistic purpose” relative to the original.¹³⁹ In *Goldsmith*, where the original and secondary works were both portraits of the singer Prince, the Second Circuit

Decades earlier, in 1979, the Northern District Court of Georgia considered the case *MGM, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, wherein the defendant raised the fair use defense regarding another *Gone with the Wind* adaptation. 479 F. Supp. 351, 354–55 (N.D. Ga. 1979). Like in *SunTrust*, the defense argued that its musical was parodic and thus was protected under fair use. *Id.* at 355. Unlike that later case, however, the court found that the musical was not sufficiently parodic and thus the amount of the original expression the defendants used was unfair. *Id.* The musical, “Scarlett Fever,” pulled heavily from the book’s lawful movie adaptation. *Id.* at 354. Specifically, it closely followed the original plot, included many of the major scenes, and used a script that was “largely faithful” to the film’s. *Id.* The defendants only added their own songs and choreography to this copied material. *Id.*

¹³³ Warner Bros. Ent. Inc. v. RDR Books, 575 F. Supp. 2d 513, 520–23, 539–51 (S.D.N.Y. 2008) (examining a fair use claim for an online *Harry Potter* lexicon that a fan created and subsequently published); see also Castle Rock Ent., Inc. v. Carol Publ’g Grp., Inc., 150 F.3d 132, 135–37, 141–46 (2d Cir. 1998) (analyzing a fan’s copying of the show *Seinfeld* to create a trivia game based on the show’s episodes).

¹³⁴ Paramount Pictures Corp. v. Axanar Prods., No. 15-09938, 2017 WL 83506, at *1, 5, 7–10 (C.D. Cal. Jan. 3, 2017) (analyzing an instance where a fan of *Star Trek* sourced more than \$1 million to create a short movie with a script that acted as a loyal adaptation of the underlying work).

¹³⁵ 11 F.4th 26, 51 (2d Cir. 2021), *aff’d*, 598 U.S. 508 (2023).

¹³⁶ *Id.* at 37–44. It also explained that the analysis entails determining how the new work may “reasonably be perceived.” *Id.* at 37 (quoting *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013)).

¹³⁷ *Id.* at 39. The court provided the example of a movie adaptation of a book. *Id.* Even if the movie changes characters, simplifies the plot, adjusts the work’s ethical messages and more, movie adaptations remain the classic example of a derivative work. *Id.* at 39–40.

¹³⁸ *Id.* at 39–40 (quoting *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (2021)).

¹³⁹ *Id.* at 41. The court noted that the existing examples satisfying that standard combined expression from multiple sources, rather than merely transform one source with additional expression. *Id.* “[T]he secondary work’s transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.” *Id.* at 42.

held that they served the same purpose.¹⁴⁰ In 2023, the Supreme Court affirmed this judgment using similar reasoning.¹⁴¹

D. From Passive Participant to Active Creator: Fan Communities and Online User-Generated Content

Traditionally discussed in the context of remix culture in music, user-generated content is not a new concept.¹⁴² Put simply, user-generated content refers to anything uploaded by traditionally amateur creators onto the modern “participative web.”¹⁴³ More specifically, it is anything created by those whom traditional markets would consider the consumer.¹⁴⁴ Fan communities center around a particular work or works, producing a creative culture around that copyrighted material.¹⁴⁵ For example, the *Star Trek* fandom is considered the genesis of modern fan community culture, whereas the *Harry Potter* fan community is emblematic of a fandom existing at what would have been an inconceivable scale before the internet.¹⁴⁶ Many fan communities that create deriva-

¹⁴⁰ *Id.*

¹⁴¹ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 520, 530 n.11 (2023). The Court affirmed that transformative use under this factor must make a secondary work sufficiently different from the original such that it could not qualify as a derivative work, as that would diminish the original author’s exclusive right to produce derivatives. *Id.* at 529. It also emphasized that the secondary work did not critically comment upon the original work, even if it could be perceived to comment on celebrity culture at large. *Id.* at 546–47.

¹⁴² See Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 842 (2009) (describing music remixes as quintessential user-generated content and defining user-generated content broadly as work made and circulated by online users). This phenomenon exists within the context of an evolving entertainment model; what was previously a system wherein a select number of players produced and disseminated works to the masses, now, the masses also produce and disseminate works amongst themselves. *Id.* at 842–43. The term first emerged in scholarship in 1995. Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 925 (2009).

¹⁴³ See Gervais, *supra* note 142, at 843, 845, 849 (explaining the “participative web” and a culture shift toward more “amateur” content). Within a so-called “proposed taxonomy” of user-generated content, “User-Derived Content” is the most difficult to analyze under current copyright law. *Id.* at 857–59.

¹⁴⁴ Halbert, *supra* note 142, at 924. This leaves copyright holders in a precarious situation: defending their rights without alienating the very community upon which their creative and commercial success relies. See Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 392 (2009) (explaining that upon viewing the music industry “attack[]” its fans for music piracy, copyright holders have taken a more nuanced view for how to handle technically infringing fan communities).

¹⁴⁵ Stacey M. Lantagne, *The Copymark Creep: How the Normative Standards of Fan Communities Can Rescue Copyright*, 32 GA. ST. U. L. REV. 459, 498 (2016). Fandoms are relatively isolated and thus do not have the same sophisticated legal knowledge as other creative entities. *Id.*

¹⁴⁶ Schwabach, *supra* note 144, at 389–90, 392–93. Even as far back as 2009, one could find hundreds of thousands, and perhaps millions, of *Harry Potter*-based user-generated stories and creations online. *Id.* at 392. Many believe fanfiction started with Gene Roddenberry, the creator of *Star Trek*, when he first aired the show at a fan conference. Kagen Despain, Comment, *Fan Films and*

tive works hold themselves to internally consistent, albeit not entirely accurate, legal standards and criticize those who break from them, particularly to commercialize their work.¹⁴⁷

The internet has put pressure on an already strained relationship between authors and fan communities.¹⁴⁸ One global giant, TikTok, is a multi-billion dollar company vying for dominance in the current online social media sphere.¹⁴⁹ TikTok, along with other social media companies, thrive on users copying each other to establish popular trends.¹⁵⁰ This Note defines a TikTok

Fanworks in the Age of Social Media: How Copyright Owners Are Relying on Private Ordering to Avoid Angering Fans, 2020 B.Y.U. L. REV. 333, 342–43

¹⁴⁷ Despain, *supra* note 146, at 350–51; *see infra* notes 214–215 and accompanying text (describing how some communities self-regulate within copyright’s grey area using trademark concepts). A so-called “gift-giving ethos” exists in fan groups, in which it is presumed that the community remain non-commercial. Despain, *supra* note 146, at 350–51; *see* Hill, *supra* note 10 (explaining that public sentiment toward Netflix’s clash with Barlow and Bear changed as “The Unofficial Bridgerton Musical’s” fan base instinctually recognized that Barlow and Bear had begun stepping outside the bounds of appropriate, non-commercial, fan community behavior). The fan communities in which Lori Jareo and E.L. James contributed, for example, rebuked them when they commercialized their fanfiction works on Amazon and through a book publisher, respectively, because doing so went against the community’s foundational understanding and invited the copyright holders’ scrutiny. Despain, *supra* note 146, at 350–51.

¹⁴⁸ Schwabach, *supra* note 144, at 392 (explaining that while the internet is not the genesis of intellectual property piracy or fanfiction, it exacerbated the issues on a new scale).

¹⁴⁹ *See* Zheping Huang, *TikTok Turns on the Money Machine*, BLOOMBERG TECH. (June 23, 2022), <https://www.bloomberg.com/news/features/2022-06-23/tiktok-becomes-cash-machine-with-revenue-tripling-to-12-billion> [https://perma.cc/859S-BWAM] (explaining that TikTok was a risk to Facebook when six months into 2022, it was slated to triple its earnings from the previous year to an estimated twelve billion dollars); *Our Mission*, TIKTOK, <https://www.tiktok.com/about?lang=en> [https://perma.cc/QAE8-6TMH] (listing eleven locations of its multiple global offices). The company had the most downloads of any app in 2021 and fosters more than one billion accounts. Huang, *supra*. TikTok describes itself as the preeminent platform for its type of entertainment: fast mobile videos. *Our Mission*, *supra*. TikTok announces that it has dual missions: stimulating artistry and creating happiness. *Id.* Due to the app’s impressive algorithm, TikTok users averaged approximately twenty-nine hours on the app each month in early 2022. Huang, *supra*. The company derives its revenue from advertisements. *Id.*

TikTok’s legal webpage contains a section dedicated to intellectual property. *Intellectual Property Policy*, TIKTOK (June 7, 2021), <https://www.tiktok.com/legal/page/global/copyright-policy/en> [https://perma.cc/D7UA-KHJJ]. The copyright section of the page explains copyright infringement for content creators, including the idea/expression dichotomy, and a notice about the potential outcomes of a copyright violation: content deletion, account suspension, or account termination. *Id.* It also provides copyright holders instructions on how to alert creators or the company of infringement in a video. *Id.* Notably, TikTok is likely indemnified from liability in the event of copyright infringement on its app. *See* 17 U.S.C. § 512(c) (providing indemnification for service providers that do not profit directly from infringing works housed on their sites as long as they also do not, or reasonably should not, have knowledge of those works or else act quickly to remove them upon notice).

¹⁵⁰ Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. 453, 551–52, 557–58, 560 (2022). For example, as accounts copy viral TikTok dances, the routines evolve beyond their original circumstances and may become unrecognizable relative to their origin. *Id.* at 554–55. Internet memes exemplify the prevalence of copying in internet culture, the demand for it, and its positive effects even on the original work. *Id.* at 457, 478.

“creator” as a user who qualifies to participate in the app’s “Creator Fund,” and thus have an opportunity to commercialize on their participation in the online community.¹⁵¹ Importantly for content creators, the app can land a popular video in front of billions of eyes, with its most popular video boasting 2.2 billion views.¹⁵² TikTok derives its popularity from bridging the gap between older social media giant models, focused on “bi-directional” interpersonal online connections, and the relatively new trend of unilateral content viewing, particularly of influencers, that extends beyond one’s social circle.¹⁵³ The app provides a few opportunities for content creators to make money, but they are not guaranteed to be lucrative.¹⁵⁴ At the time of writing, President Biden signed a Bill into law that will ban TikTok in the United States if the Chinese parent company does not sell it within nine months.¹⁵⁵

¹⁵¹ See *TikTok Creator Fund: Your Questions Answered*, TIKTOK (Mar. 25, 2021), <https://newsroom.tiktok.com/en-gb/tiktok-creator-fund-your-questions-answered> [<https://perma.cc/6RH8-WJU3>] (describing the purpose of the Creator Fund as a reward for creators to foster passion and help creators convert their use of the app into a job); *infra* note 154 and accompanying text (providing a more detailed explanation of how creators can commercialize their videos on the app). To qualify for the fund, adult creators must (1) have more than 10,000 followers, (2) have had a cumulative 100,000 views on their videos in the past month, and (3) comply with the app’s community guidelines and terms of service. *TikTok Creator Fund: Your Questions Answered*, *supra*.

¹⁵² See Zheping Huang, *TikTok Has a Few Main Ingredients for Making Money*, BLOOMBERG TECH. (June 28, 2022), <https://www.bloomberg.com/news/newsletters/2022-06-28/how-does-tiktok-make-money-app-relies-on-a-few-main-ingredients> [<https://perma.cc/E339-5JY8>] (providing that an eighteen-second TikTok depicting a creator “flying on a magic broomstick” is the app’s most viewed video as of 2022). Popularity on TikTok can also drive audiences to engage more with a creator’s content on other platforms, such as music streaming platforms. Chang et al., *supra* note 11 (quoting Abigail Barlow).

¹⁵³ AJ Kumar, *How TikTok Changed the Social Media Game with Its Unique Algorithm*, ENTREPRENEUR (Aug. 16, 2022), <https://www.entrepreneur.com/science-technology/how-tiktoks-unique-algorithm-changed-the-social-media/431804> [<https://perma.cc/6DZA-4K4Q>]; John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), <https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html> [<https://perma.cc/L9T2-UZA5>] (discussing TikTok’s development and emergence and how it uniquely contributes to internet culture). TikTok bridges this gap by incorporating personalized, targeted content based on each user’s demonstrated interests on the app, thus allowing each person’s feed to be simultaneously personal and global. Kumar, *supra*; Herrman, *supra*.

¹⁵⁴ Dan Whateley, *How Much Money TikTokers Make, According to Creators*, BUS. INSIDER (Dec. 21, 2022), <https://www.businessinsider.com/how-much-money-tiktokers-make-real-creator-examples-2021-7> [<https://perma.cc/CX57-7L5W>]. Some methods by which creators can get money from their TikTok content include receiving “gifts,” utilizing the Creator Fund, and in certain circumstances, participating in a subscriber program. *Id.* The Creator Fund uses several factors to calculate a disbursement to a creator that roughly translates to only a few cents per one thousand views. *Id.* One emblematic creator with 2.4 million followers on the app reported earnings of only \$1,664 for five months of videos in early 2021. *Id.* Extremely successful creators can participate in an additional “ad-revenue sharing program” wherein they evenly split the profits of an advertising program with TikTok for every one of their videos that is followed by an ad. *Id.* That model also does not earn them much money, however. *Id.* Finally, creators can get the most money from leveraging their platforms for direct brand sponsorship deals or music promotion. *Id.*

¹⁵⁵ Cristiano Lima-Strong, *Biden Signs Bill That Could Ban TikTok, a Strike Years in the Making*, WASH. POST, <https://www.washingtonpost.com/technology/2024/04/23/tiktok-ban-senate-vote-sale->

E. Understanding Disney and Netflix's Circumstances Around and Approaches to Fan-Generated Adaptations

Disney has not historically taken a lenient approach with its intellectual property rights.¹⁵⁶ Nonetheless, in the face of the online musical sensation based on *Ratatouille*, Disney quickly and smoothly provided explicit consent to develop a musical adaptation, allowing the viral sensation to transition from a crowd-sourced TikTok creation to a professional production streamed to support the Actors Fund charity.¹⁵⁷ In its public statement, Disney announced that it had no intention of developing the work itself, but appreciates when the public connects with its works.¹⁵⁸ The parties agreed that the event would only last seventy-two hours online, and the non-profit nature of the show was central to the permission.¹⁵⁹ On January 1, 2021, the “Ratatousical” premiered online and

biden/ [https://perma.cc/ARH6-SQZT] (Apr. 24, 2024). TikTok’s CEO publicly stated that the company will file a lawsuit focusing on users’ First Amendment rights. *Id.* Rather than utilizing a direct ban that would require monitoring Americans’ phones, the Bill targets the technology companies that make its use possible in the United States, such as Apple and Google. Drew Harwell & Eva Dou, *House TikTok Bill Gives ByteDance 6 Months to Sell. That’s Unlikely.*, WASH. POST (Mar. 17, 2024), <https://www.washingtonpost.com/technology/2024/03/17/tiktok-sale-ban-challenges/> [https://perma.cc/GTK8-ETD9].

¹⁵⁶ Shaw, *supra* note 1. For example, Disney lobbied Congress to increase the length of copyright protections to protect its central mascot, Mickey Mouse, on two separate occasions. Gagliardi, *supra* note 2, at 158. First, Congress passed the Copyright Act of 1976 and extended copyright protection across the board, maintaining Mickey’s protection until 2003, when it was originally set to expire in 1984. *Id.* Then, in 1998, the law changed again, protecting Mickey until 2023. *Id.* See generally Anna Gordon, *Mickey Mouse Is Now in the Public Domain After 95 Years of Disney Copyright*, TIME (Jan. 2, 2024), <https://time.com/6551496/mickey-mouse-public-domain-steamboat-willie/> [https://perma.cc/HD35-6T79] (explaining how Disney’s original iteration of Mickey Mouse, Steamboat Willie, has entered the public domain, while the more modern updates remain protected). Disney also litigates to protect its intellectual property. See, e.g., *Walt Disney Co. v. Powell*, 897 F.2d 565, 567 (D.C. Cir. 1990) (describing Disney’s suit against a merchandise vendor who sold shirts with characters that looked like Minnie and Mickey Mouse); Complaint at 1–2, *Disney Enters., Inc. v. The Secret Dis Grp. LLC*, No. 22-02417 (M.D. Fla. Dec. 29, 2022) (containing a recent case Disney filed to enforce its copyrights and trademark rights against a company selling merchandise with Disney characters and other marks online).

¹⁵⁷ Shaw, *supra* note 1. Apparently, it was simply “a matter of phone calls” to reach the president of Disney Theatricals, Tom Schumacher, who “clear[ed] the path” for the derivative work. *Id.* The time from when a representative of The Actors Fund first reached out to Schumacher to the deal being finalized took only a few days. *Id.* The producers and writers had two weeks to transform the piecemeal musical into a cohesive script. *Id.* The creators of the final product aimed in many ways to stay true to the musical’s TikTok roots by way of popular internet casting and viral dance-inspired choreography. *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Indeed, in its public statement, Disney emphasized its gratitude for the musical creators’ contribution to helping The Actors Fund during the “unprecedented time” that COVID-19 represented. *Id.* While the public may not know why Disney was inclined to cooperate, one scholar has generally noted that copyright owners often tolerate the use of their work because they are apathetic or otherwise do not wish to allocate resources to litigation; they wish to strengthen ties to, rather than alienate, fans; and/or the value of their own work is likely to increase alongside the “economic complement” of the unofficial derivative. Wu, *supra* note 100, at 619.

generated one million dollars for the Actors Fund that day.¹⁶⁰ Disney permitted this performance despite its eventual derivative works based on the movie: a new *Ratatouille* ride at EPCOT park in Disney and an ensuing album containing the music experienced therein.¹⁶¹

Though Disney's collaboration with the minds behind the "Ratatosical" appears to have been straightforward and effective, Netflix's attempts at a similar result were ultimately unsuccessful.¹⁶² Netflix's series *Bridgerton* is itself an adaptation of a book series by author Julia Quinn.¹⁶³ Quickly, the program began breaking Netflix's viewership records.¹⁶⁴ In response, the company renewed the series, developed a live event called "The Queen's Ball: A Bridgerton Experience" in multiple cities, created official merchandise, and released a soundtrack album to popular streaming services.¹⁶⁵ After Season One's release, defendant Barlow began to post TikTok videos about *Bridgerton*, eventually creating a musical rendition of the season alongside Bear.¹⁶⁶ In

¹⁶⁰ *Ratatouille Musical: TikTok Phenomenon Raises \$1m for Actors' Charity*, BBC (Jan. 4, 2021), <https://www.bbc.com/news/entertainment-arts-55528359> [<https://perma.cc/ST22-HJDA>]; *Ratatouille Musical @ratatousical*, TWITTER (Jan. 1, 2021), <https://twitter.com/ratatousical/status/1345197450458501124/photo/1> [<https://perma.cc/372S-4E5Q>].

¹⁶¹ *See Remy's Ratatouille Adventure*, WALT DISNEY WORLD, <https://disneyworld.disney.go.com/attractions/epcot/remys-ratatouille-adventure/> [<https://perma.cc/R93L-RB8Y>] (showcasing Remy's *Ratatouille* Adventure as an attraction in EPCOT); Shannen Michaelson, *Photos: Say "Bonjour!" as Remy's Ratatouille Adventure and France Pavilion Expansion Officially Open at EPCOT*, WDW NEWS TODAY (Oct. 1, 2021), <https://wdwnt.com/2021/10/photos-remys-ratatouille-adventure-and-france-pavilion-expansion-officially-open-at-epcot/> [<https://perma.cc/XC8R-T2Z5>] (explaining that Remy's *Ratatouille* Adventure opened October 1, 2021); *Music from Remy's Ratatouille Adventure*, DISNEY MUSIC LICENSING, <https://www.disneymusiclicensing.com/album/MTk2MTk2Ny0zYTlIMTM> [<https://perma.cc/BFL7-2JZG>] (displaying that Disney released the soundtrack album of songs from the ride on October 5, 2021). Additionally, Disney has a long history of creating musicals from its own copyrighted works. Gagliardi, *supra* note 2, at 167 (providing that Disney has created seventeen such productions).

¹⁶² *See infra* notes 169–181 and accompanying text (describing the collapse of extrajudicial communication between Netflix and Barlow and Bear that ultimately led to litigation).

¹⁶³ Complaint, *supra* note 17, at 3.

¹⁶⁴ Andreeva, *supra* note 15.

¹⁶⁵ Complaint, *supra* note 17, at 4. The Complaint refers to "The Queen's Ball: A Bridgerton Experience" as an "immersive, ticketed experience." *Id.* at 8. Netflix highlighted the Washington D.C. venue for this experience in the Complaint because it ran at approximately the same time as Barlow and Bear's live performance at D.C.'s Kennedy Center. *Id.*; *see infra* note 174 and accompanying text (describing the Kennedy Center performance). Netflix's live experience in Washington D.C. ran from March to July 2022 and sold tickets beginning at \$39. *The Queen's Ball: A Bridgerton Experience Washington DC*, THE QUEEN'S BALL: A BRIDGERTON EXPERIENCE, <https://bridgertonexperience.com/washington/> [<https://perma.cc/Z6AU-5B6G>]. Among other "immersive" and "interact[ive]" elements, the event featured live musical performances of the show's soundtrack. *Id.* *Bridgerton* fused modern and Regency culture to appeal to modern audiences in part by including instrumental adaptations of modern songs, such as "thank u, next" by Ariana Grande. Complaint, *supra* note 17, at 3 & n.2.

¹⁶⁶ Complaint, *supra* note 17, at 9. The duo has explained that the songs all reflect artistic aspects of the show. *Id.* For example, Barlow took inspiration for song titles directly from the show's dialogue. *Id.*

its album form, “The Unofficial Bridgerton Musical” consists of fifteen songs cumulatively totaling approximately thirty-eight minutes.¹⁶⁷ In deriving inspiration from *Bridgerton*, Barlow and Bear allegedly copied certain material literally and appropriated other, more abstract, expression from the show.¹⁶⁸

When the musical began to gain notoriety on TikTok in early 2021, *Bridgerton* actors, Netflix, and others involved in the show’s production took to the internet to “applaud[.]” Barlow and Bear.¹⁶⁹ By March 2021, the musical had gone viral and Barlow and Bear’s lawyer asked for Netflix’s consent for the pair to (1) produce an album of the musical and (2) participate in a charity event scheduled for the summer of 2021.¹⁷⁰ Three months later, Netflix replied that it was “not approving or authorising” the requests but also would not impede them.¹⁷¹ In August of that year, as the album approached, Netflix reached out to Barlow and Bear to clarify its expectations for the relationship going forward.¹⁷² In March 2022, the situation changed: Barlow and Bear received a GRAMMY nomination.¹⁷³ Then, in June of that year, the pair’s representative notified Netflix of a live event they had planned on July 26 at the Kennedy Center.¹⁷⁴ When Netflix asked follow-up questions, Barlow and Bear informed

¹⁶⁷ BARLOW & BEAR, *The Unofficial Bridgerton Musical* (Sept. 10, 2021) (downloaded using Spotify).

¹⁶⁸ Complaint, *supra* note 17, at 10. The Complaint claims that some of the musical’s lyrics come directly from the show’s dialogue and characters. *Id.* For example, the defendants incorporated the show’s line “[w]hy must our only options be to squawk and settle or to never leave the nest? What if I want to fly?” into a song in the musical as “I don’t want to settle and squawk/or never leave the nest . . . what if I want to fly?” *Id.* at 11–12. In addition, “plot, place, sequence of events, mood, setting, and themes are replicated faithfully.” *Id.* at 10.

¹⁶⁹ *Id.* at 13. Netflix’s Complaint notes that the company chose not to terminate Barlow and Bear’s work on TikTok then because they “represented [it] as their personal TikTok fan tribute.” *Id.*

¹⁷⁰ *Id.* at 13–14.

¹⁷¹ *Id.* at 14. The parties did not discuss a license. *Id.*

¹⁷² *Id.* Namely, Netflix stressed that Barlow and Bear could not participate in any live performances or other events that could oppose those of Netflix. *Id.* In the ensuing months, the parties would again discuss the aforementioned summer charity event that had been rescheduled. *Id.* at 14–15. In that time, Netflix again took the position that it would not authorize live performances but also appeared to once more acquiesce to a single charity event. *Id.*

¹⁷³ *Id.* at 15. As they had previously done regarding the prospect of live performances, Barlow and Bear—through their representative—said that there were no plans to utilize the musical after The GRAMMY Awards. *Id.* (citing assurances to Netflix that the duo did not wish to limit their fame to *Bridgerton*’s shadow, and thus would shift focus to other projects down the line). In choosing not to escalate or otherwise formalize the arrangement, Netflix allegedly “relied on these representations.” *Id.*

¹⁷⁴ *Id.* The event did proceed as planned on July 26, 2022. *Id.* at 17. Tickets cost between \$29 and \$149 each, with an additional “VIP package” option. *Id.*; see Barlow and Bear’s *The Unofficial Bridgerton Musical Album Live in Concert*, KENNEDY CTR., <https://www.kennedy-center.org/nso/home/2021-2022/barlow-and-bear/> [<https://perma.cc/3GAK-2NTW>] (advertising the event and explaining the VIP package option). The event, lasting approximately one hour and fifteen minutes, featured Barlow and Bear alongside the National Symphony Orchestra, an ensemble, and special musical guests and utilized the services of a director and a production stage manager. Barlow and Bear’s *The Unofficial Bridgerton Musical Album Live in Concert*, *supra*. VIP ticket upgrades cost an additional \$50, which secured ticket holders the opportunity to meet Barlow and Bear and receive a signed poster. *Id.*

the company that they did not seek its permission and planned to announce the Kennedy Center performance promptly.¹⁷⁵ In response, Netflix offered, for the first time, to negotiate a license.¹⁷⁶ Barlow and Bear chose not to negotiate such an agreement.¹⁷⁷

Finally, on July 29, 2022, Netflix filed suit in the Federal Court for the District of Columbia.¹⁷⁸ Netflix alleges that the Kennedy Center performance negatively impacted the Washington, D.C. location of “The Queen’s Ball: A Bridgerton Experience.”¹⁷⁹ After explaining this timeline of events in its Complaint, Netflix explicitly stated that Barlow and Bear had no surviving right, if any had ever existed, to use the underlying *Bridgerton* content.¹⁸⁰ The Complaint contains four counts: one for copyright infringement, another for declaratory judgment stating that the defendants have no license or other right to *Bridgerton*, a third for trademark infringement, and a claim of “false designation of origin.”¹⁸¹

II. A DISCUSSION OF LEGAL SCHOLARSHIP ANALYZING AND PROPOSING CHANGES TO THE CURRENT COPYRIGHT SCHEME

There is no paucity of scholarly discussion of the merits and problems of the current copyright scheme, particularly in the face of modern technology.¹⁸² Section A of this Part delves deeper into a cross-section of the various angles

¹⁷⁵ Complaint, *supra* note 17, at 15–16. At the time of filing, there was a second live performance scheduled at Royal Albert Hall. *Id.* at 18.

¹⁷⁶ *Id.* at 16. The Complaint’s characterization of the proposed license explains that it would have authorized both the Kennedy Center performance and another planned performance at the Royal Albert Hall, formally authorized the album and its dissemination, and allowed live performances of the songs as part of other programs in the future. *Id.*

¹⁷⁷ *Id.* In addition, Netflix learned from the press that the Kennedy Center performance planned to incorporate Broadway singers. *Id.* The performance incorporated sixteen such actors. *Id.* at 17. The company also learned, via TikTok, that Barlow and Bear planned to include new songs beyond what was on the album and develop some of the existing ones. *Id.* at 16.

¹⁷⁸ *Id.* at 1, 25. Netflix voluntarily dismissed the case before the defendants filed an answer. *See* Notice of Voluntary Dismissal, *supra* note 20, at 1 (showing that Netflix voluntarily dismissed its case on September 23, 2022, with prejudice before an answer was docketed). Consequently, the timeline and “truth” of the negotiations provided in this Note are entirely from Netflix’s perspective. *See generally* Complaint, *supra* note 17 (containing the only factual record on file for the case).

¹⁷⁹ Complaint, *supra* note 17, at 18.

¹⁸⁰ *Id.* (“Barlow & Bear lacked any license, approval, or authorization to exploit *Bridgerton* intellectual property . . . And to the extent Barlow & Bear ever claimed to believe they had such license, approval, or authorization—despite Netflix’s clear statements to the contrary—it has now been unequivocally revoked.”).

¹⁸¹ *Id.* at 20–24. For the scope of this Note, only Count I and Count II—for copyright infringement and declaratory relief related to that infringement—are relevant. *See infra* notes 238–259 and accompanying text (arguing only for updates to copyright considerations).

¹⁸² *See, e.g., infra* notes 185–237 and accompanying text (delineating just a portion of the considerations and arguments surrounding copyright law, even just within the derivative works context).

from which legal scholarship views the current state of copyright law.¹⁸³ Section B considers the U.S. Supreme Court's approach to a laches defense to copyright infringement.¹⁸⁴

A. Consideration, Criticism, and Support of Existing Doctrines

There are some criticisms of existing copyright doctrine that strike at its very heart.¹⁸⁵ One such criticism lobbied against copyright law is that its increasing protections for original copyright owners impermissibly interfere with others' First Amendment freedom of speech rights.¹⁸⁶ This tension could be nothing more than overblown anxieties that are not actually litigated, however.¹⁸⁷ A second criticism is that the Copyright Act's creation and subsequent amendments have been fraught with the bias of special interest groups.¹⁸⁸ Such interference could jeopardize the delicate balance that modern realities already threaten.¹⁸⁹ These special interests, critics argue, have convinced Congress to legislate copyright protection that extends beyond what is required to incentivize creativity, thus undermining the central purpose of copyright law.¹⁹⁰ Furthermore, they ignore the critical fact that no creativity exists in a vacuum, but rather a continuum of creative expression and gradual adaptation.¹⁹¹ A solution to the enormous influence of these interest groups comes from customary con-

¹⁸³ See *infra* notes 185–226 and accompanying text.

¹⁸⁴ See *infra* notes 227–237 and accompanying text.

¹⁸⁵ See *infra* notes 186–193 and accompanying text (discussing how these criticisms speak to constitutional issues and the potential dangers of special interest group influence).

¹⁸⁶ See Lackland H. Bloom, Jr., *Copyright Under Siege: The First Amendment Front*, 9 COMPUT. L. REV. & TECH. J. 41, 41, 45 (2004) (explaining that there has been an uptick in First Amendment criticism of the direction copyright law is headed); see, e.g., Keller, *supra* note 131, at 549–50 (arguing that the derivative works right does not properly balance First Amendment rights and monetary interests). This increase in First Amendment scrutiny for copyright protection comes at a time when copyright has become particularly fraught, in part due to growing tensions surrounding the internet's effects on traditional doctrine. Bloom, *supra*, at 41.

¹⁸⁷ See Bloom, *supra* note 186, at 46 (explaining that copyright law has doctrines that function as safeguards against First Amendment violations: its statute of limitations, the idea/expression dichotomy, and fair use).

¹⁸⁸ Steven D. Jamar, *Internet Expression in the 21st Century: Where Technology and Law Collide: Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER COMMONWEALTH L. REV. 843, 872 (2010) (discussing how special interest groups' efforts have historically been detrimental to individuals attempting to create derivative works).

¹⁸⁹ See *id.* (explaining that special interests have resulted in longer and more protective rights as well as more powerful means of administering them); Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 588 (2006) (arguing that these interests jeopardize the derivative right's balance because they prioritize a minority of influential people at the expense of public interest).

¹⁹⁰ See Bohannon, *supra* note 189, at 588 (considering the reproduction right and pondering a potential "narrow" derivative right sufficient to incentivize creation).

¹⁹¹ *Id.* at 589–90. Many works that society now considers quintessentially "original," such as *David* by Michelangelo or Mark Twain's books, were themselves derivative of previous works. *Id.* at 590.

tract doctrines and would interpret any uncertainty in the Copyright Act against any party or interest that played a significant role in drafting the Act's language and structure.¹⁹² Any such ambiguity would then be interpreted on behalf of secondary users in the name of public interest and would, in turn, reduce the scope and power of the derivative works right.¹⁹³

These concerns speak to potentially foundational conflicts in copyright, but there are also narrower discussions of how the derivative works right and fair use doctrine apply in the modern internet era.¹⁹⁴ First, the derivative works right and its corollary, the fair use defense, exhibit internal tensions.¹⁹⁵ Specifically, courts' application of the first and fourth fair use factors—the defendant's purpose and potential market substitution or harm, respectively—consistently undermines the secondary artist's fair use claim in order to bolster the derivative works right.¹⁹⁶ As both the derivative right and fair use doctrines are statutorily based, this conflict creates statutory ambiguity.¹⁹⁷ Courts have already broadened fair use analyses to address problems with user-generated content, focusing more on the creation's purpose and character than other considerations.¹⁹⁸ Given that “amateur” and “private” use are no longer synonymous, copyright should perhaps draw the line instead between works that are “parasitic” to the original, versus “simply free-riding.”¹⁹⁹ Some scholars go even further, however, and suggest that even commercial fan use that is sufficiently transformational should be protected.²⁰⁰

The strain on fair use is likely to continue expanding because copying is essential to online culture and shows no signs of stopping.²⁰¹ This trend is not driven by laziness or apathy, but emerged because social networks actively promote it.²⁰² Yet, similar to arguments in favor of stringent patent protections,

¹⁹² *Id.* at 614.

¹⁹³ *See id.* (explaining that this would correct the fact that the Act no longer balances vying interests fairly and that copyright law incentivizes monopolies).

¹⁹⁴ *See infra* notes 195–226 and accompanying text (describing copyright considerations that extend beyond foundational copyright principles and purposes).

¹⁹⁵ Bohannon, *supra* note 189, at 594–98.

¹⁹⁶ *Id.* These tensions are particularly true for transformative works. *Id.* at 595.

¹⁹⁷ *Id.* at 594.

¹⁹⁸ Warren B. Chik, *Paying It Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law*, 11 J. MARSHALL REV. INTELL. PROP. L. 240, 245–46, 249 (2011).

¹⁹⁹ Gervais, *supra* note 142, at 855, 867.

²⁰⁰ Jamar, *supra* note 188, at 859, 865.

²⁰¹ *See* Adler & Fromer, *supra* note 150, at 560 (explaining that online copying is fast and simple, socially normalized, and can be beneficial even for the original work's worth and significance); *see also* Wu, *supra* note 100, at 618 (arguing that near-universal access to technology capable of facilitating either “harmful” or “harmless” copying explains modern copyright law's ambiguity and difficulty).

²⁰² *See id.* at 553, 560 (providing the example of TikTok trends that rely on copying to be engaging and successful and analogizing those trends to internet memes).

increasing restrictions on copying may actually incentivize more creativity.²⁰³ The way online culture affects today's market and its intersection with the derivative works right also puzzles scholars.²⁰⁴ Chiefly, when viewing the current economy as "The Attention Economy," maintaining the derivative works right could become necessary to avoid oversaturating the market with excessive information.²⁰⁵

Another strain on existing doctrine is that some believe copyright law has evolved to encompass purposes and doctrines it was not designed to include.²⁰⁶ One critique of courts' statutory interpretation suggests that they subconsciously apply moral right considerations to derivative work analyses in lieu of the Constitution's "utilitarian mandate," thus over-enforcing this right.²⁰⁷ Arguably, such underlying moral considerations have transformed the right to "prepare and license" derivative works into the right to block or otherwise restrain use in markets the owner has no intention to enter themselves.²⁰⁸ A potential solution to the expansion of moral rights in copyright is to expand the Copyright Act's compulsory license system into the derivative works right.²⁰⁹ Con-

²⁰³ Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1340, 1394 (2015).

²⁰⁴ See Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 158 (2020) (arguing against narrowing the derivative works right and contending that scholars who do call for such change ignore the strain that an overabundance of creative works creates on the market, which contains a limited quantity of consumer attention).

²⁰⁵ *Id.* at 163–65, 187. Specifically, allowing more instances of copying would make it significantly easier for such works to enter the market. *Id.* at 187. Then, those works would be in direct competition with the original in a market where attention is essentially the currency. *Id.* This argument relies heavily on the concept that market substitution is mutually detrimental. *Id.*

²⁰⁶ Romanenkova, *supra* note 56, at 197 (explaining that scholars have criticized the expanding nature of copyright protections for decades).

²⁰⁷ Keller, *supra* note 131, at 514–15. The moral right arguably at issue in such cases is the right of integrity. *Id.* at 517. In addition, Congress may have made the definition of "derivative work" within the Act itself too broad, such that jurisprudence has moved beyond what the Constitution or historical tradition support. *Id.* at 546.

²⁰⁸ *Id.* at 530. Some scholars take aim specifically at the exclusivity of the derivative right. *Id.* at 550. For example, the 2010 Second Circuit Court of Appeals case *Salinger v. Colting*—where the plaintiff claimed an "absolute right" to control derivative works even when also clearly stating no intention of creating one itself—demonstrates how the derivative right has evolved beyond utilitarian or economic considerations mentioned in the Constitution. *Id.* at 523–25. See generally *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010).

²⁰⁹ See, e.g., Keller, *supra* note 131, at 549–50 (suggesting a change to 17 U.S.C. § 106(2) to weaken the derivative works right and include a compulsory license). To account for special circumstances, such an amendment could occur in tandem with creating a § 106B to explicitly provide for moral rights-based protection of works in certain situations. *Id.* at 550 ("A new § 106B aimed at protecting an author's integrity right would plainly state its intent and justification as the protection of an author's work from distortion, mutilation, or other modification which is prejudicial to his or her reputation."). Compulsory licenses would eliminate the right to grant permission that original authors now wield within the derivative works right and would replace it with a right to receive payment, thus arguably still providing the necessary creative incentives. Robert J. Morrison, *Deriver's Licenses: An Argument for Establishing a Statutory License for Derivative Works*, 6 CHI.-KENT J. INTELL. PROP.

gress could also add a user-generated content exception to the Copyright Act, which would function similarly to the explicit carveouts that exist for teaching, critique, and parody.²¹⁰ On the other hand, less statutory involvement may be preferable, as it allows parties to individually engage in private ordering.²¹¹ “The Unofficial Bridgerton Musical” negotiation breakdown cautions against such a solution being the only change implemented, however.²¹²

Another critique is of the “creep” of trademark concepts into copyright law to strengthen copyright owner’s claims beyond what the Act likely intended.²¹³ In response to this “creep,” fan communities themselves have created internal norms and systems through which they generate more expectations and reliance.²¹⁴ Specifically in utilizing trademark concepts, many online communities have filled in copyright’s gaps to recalibrate an uneven balance of bargaining power.²¹⁵

Regardless of whether one condemns or commends the current system, consent is certainly a muddled issue in copyright infringement cases.²¹⁶ There

87, 87 (2006). Congress could fashion compulsory licenses modeled on the compulsory licenses already contained in both the Copyright Act and trademark doctrine. *Id.*

²¹⁰ Chik, *supra* note 198, at 270 (highlighting two potential solutions that follow this model); Romanenkova, *supra* note 56, at 205–07 (discussing the imperfect solution of modeling a user-generated content exception after these existing fair use carve-outs). A user-generated content exception could take the form of either of two potential statutory amendments. Chik, *supra* note 198, at 270. The first would provide a “General UGC [user-generated content] exception,” whereas the second would use an exhaustive list of protected uses in a “Purpose-specific UGC [user-generated content] exemption.” *Id.* at 270–71 (modeling proposed statutory language). The purpose of this approach is to embrace the usefulness and legitimacy of user-generated content and certain copying. *Id.* at 257.

²¹¹ Despain, *supra* note 146, at 376–79. Paramount’s clear guidelines that it instituted in the face of numerous fan films based on *Star Trek* are a useful example. *Id.* at 365–70. Also, Warner Brothers’ approach to private ordering allows non-commercial derivatives of *Harry Potter* and imposes fewer specific limitations on the fans than Paramount did, but arguably functions to put them on notice of which behaviors the company will or will not litigate. *Id.* at 370–73.

²¹² See *supra* notes 162–181 (describing how Netflix and Barlow and Bear failed to reach a mutually beneficial arrangement for “The Unofficial Bridgerton Musical” during negotiations).

²¹³ Lantagne, *supra* note 145, at 471–72 (explaining that when copyright owners “feel exposed” by copyright law shortcomings, they often turn to trademark protections). The strengthening of copyright monopolies using trademark concepts is referred to as the “copymark creep” and is exemplified by famous fictional characters that serve both copyright and trademark functions. *Id.*

²¹⁴ See, e.g., *id.* at 499, 502 (describing how fan communities have begun implicitly pulling from trademark principles to settle ambiguities in the law within their own communities). Ultimately, fans creating derivative works want clarity that reliance can bring. *Id.* at 499, 503. Online communities have, in particular, embraced trademark’s emphasis on avoiding confusion with the owner. *Id.* at 502. This is true especially when elements of commercialization appear. *Id.*

²¹⁵ *Id.* at 502–03, 505–06 (explaining that by drawing their own line at commercialization and eliminating consumer confusion as to the unofficial nature of works, online communities limit, to some extent, copyright holders’ “monopol[ies]”); see Gervais, *supra* note 142, at 854–55 (arguing that this self-regulation among online fan communities represents pervasive “social norms” that copyright law should not ignore).

²¹⁶ See *supra* notes 99–102 and accompanying text (explaining that consent is handled differently by many federal circuit courts).

are two helpful ways to conceptualize it: (1) creating a consent “typology” and (2) viewing consent in implied licenses from a property, rather than contract, perspective.²¹⁷ First, instead of a monolith, consent in copyright cases can be viewed within a spectrum, subject to an academic typology.²¹⁸ This typology can be constructed using either a quantitative or qualitative lens.²¹⁹ The former’s aim is to determine a point of ambiguity at which a fair use defense should be able to include a consideration of the copyright holder’s consent and the defendant’s ensuing reliance.²²⁰ In intermediate cases, where consent is partial or the copyright holder has otherwise acquiesced, scholars argue this reality should play a part in courts’ analyses, particularly because of the effect of user reliance in such situations.²²¹

Another way to view consent’s role in the current system involves considering implied licenses through a property law, rather than contract law, lens.²²² Though the presumption for nonexclusive licenses requires explicit permission, scholars have argued that courts, based on property concepts, should make exceptions for conduct implying licenses based on the alleged infringer’s objective reasonableness in concluding that the permission was granted.²²³ Still, courts will only allow such conduct to permit the use of the copyrighted material if the copyright holder has not explicitly denied consent.²²⁴ Under this view, a court may find that a copyright owner implies a license when they help facilitate the user’s otherwise infringing use, engage in conduct with a reasonable and customary outcome, or fail to effectively communicate information known to them when they are the more sophisticated

²¹⁷ See *infra* notes 218–226 and accompanying text (explaining these two views of consent).

²¹⁸ Hickey, *supra* note 103, at 428–32. This is particularly true, as the law stands currently, in the fair use context. *Id.*

²¹⁹ *Id.* The quantitative spectrum contains five categories of consent, in descending order of the strength of the consent. *Id.* at 428–30. First, there is “Affirmative Consent,” followed by “Partial Consent,” then “Failure to Express Disapproval” or “Opt Out,” next is “Silence,” and finally there is “Partial or Explicit Refusal.” *Id.* The qualitative analysis investigates the motives behind the parties’ actions regarding consent. *Id.* at 430. The categories include, among others, “Strategic Behavior”—on the part of either party—and “Good Faith.” *Id.* at 430–31.

²²⁰ *Id.* at 428–30.

²²¹ *Id.* at 437–39. This is perhaps best exemplified in cases where reliance has occurred and there appears to be “strategic behavior,” from either side, but particularly on the part of a copyright owner who chooses not to condemn uses of which he is aware. *Id.* at 427.

²²² Newman, *supra* note 86, at 517, 519, 558 (arguing for the property-based viewpoint of implied copyright licenses, utilized in *Oddo v. Ries* and *I.A.E., Inc. v. Shaver*, that would not require either mutual agreement or consideration, as a contractual model would).

²²³ *Id.* at 520–21. When considering implied licenses in copyright through a property lens, this objective consideration aligns with the *in rem* nature of property law. *Id.* In particular, scholars argue that an objective approach assessing the reasonableness of reliance on conduct indicating assent is superior to an approach requiring circumstantial investigations into copyright owners’ subjective intent because the latter would entail “too heavy an informational burden.” *Id.* at 521.

²²⁴ *Id.* at 521.

party.²²⁵ Ultimately, this view of implied licenses renders them similar to the doctrine of equitable estoppel, but with subtle differences.²²⁶

B. The Case of Petrella v. MGM: Justice Ginsburg and Justice Breyer's Differing Opinions on Laches in Copyright Suits

In 2014, in *Petrella v. MGM*, the Supreme Court considered the viability of a laches defense in a copyright case.²²⁷ Justice Ruth Bader Ginsburg wrote the Court's opinion on behalf of six justices and Justice Stephen Breyer authored a dissent.²²⁸ Laches, the Court held, is applicable when Congress has not established a statute of limitations.²²⁹ It consequently rejected the defendant's argument that laches should protect defendants from plaintiffs' waiting

²²⁵ *Id.* at 528–31. One scholar refers to the second scenario as “[i]nference [of intent to grant a license] based on majoritarian default rule.” *Id.* at 529. In his explanation, he clarifies that rather than implying actual consent, this category exists because there are scenarios in which one can reasonably expect certain actions to connote consent. *Id.* This is particularly true when one acknowledges that a copyright holder likely understands societal norms, and thus his conduct conforming to norms is reasonably indicative of his intent, without requiring lengthy and expensive discovery stages. *Id.* Ultimately, in situations that are customary and whose outcomes are reasonably foreseeable to the copyright holder, the burden should shift to the copyright owner to avoid the situation if it is not what he desires. *See id.* at 530 (discussing this burden shift more generally).

²²⁶ *Id.* at 523 (explaining that an implied license “conveys the message: ‘I know what you are doing, and you are doing it with my blessing for the time being’” whereas equitable estoppel doctrine applies to “conduct calculated to avoid advertising the lack of blessing until it is too late to bargain for one”).

²²⁷ 572 U.S. 663, 667 (2014). The case involved a 1980 MGM movie, *Raging Bull*, a licensed movie based on a 1963 screenplay. *Id.* at 673. Although the plaintiff renewed the screenplay's copyright in 1991, her attorney waited until 1998 to notify the defendant, who had rights to the derivative movie, of the renewal and that any further use of *Raging Bull* would infringe on the plaintiff's underlying copyright. *Id.* at 674. The parties then unsuccessfully attempted to privately order for two years. *Id.* Finally, in 2009, the plaintiff sued MGM for the infringement between 2006 and 2009. *Id.* at 674–75. Importantly, the case focused on the fact that MGM had been using *Raging Bull* prior to 2006 without the plaintiff filing suit. *Id.* at 675–76.

²²⁸ *Id.* at 667, 688. Justices Scalia, Thomas, Alito, Sotomayor, and Kagan joined the Court's opinion, and Chief Justice Roberts, and Justice Kennedy joined the dissent. *Id.* at 666.

²²⁹ *Id.* at 678. Justice Ginsburg found it “telling[.]” that, in his dissent, Justice Breyer did not cite to any Supreme Court cases that enforced laches when a plaintiff brought its claim within a statute of limitations. *Id.* at 679. Justice Ginsburg summarized the Court's view of laches as having a “gap-filling, not legislation-overriding, office.” *Id.* at 680. The Court continued that this view of laches helps avoid the arbitrariness of judges individually determining an appropriate time limit and undermining congressional intent for uniformity evidenced by a three-year statute of limitations. *Id.* at 680–81. Scholarship has argued that laches need not be at odds with statutes of limitations, however. *E.g.*, Vikas K. Didwania, Comment, *The Defense of Laches in Copyright Infringement Claims*, 75 U. CHI. L. REV. 1227, 1228–29 (2008). Laches, estoppel, and acquiescence are statutorily defined defenses in trademark law, which does not have a statute of limitations. 15 U.S.C. § 1115(b)(9); *Petrella*, 572 U.S. at 678 n.15. In 2017, in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, the Supreme Court held that the reasoning in *Petrella v. MGM* applied to the Patent Act as well. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 331–32 (2017). Justice Breyer dissented again in *SCA Hygiene Products*. *Id.* at 346–56 (Breyer, J., dissenting).

games.²³⁰ In doing so, it favored an approach that allowed copyright owners to “defer” while maintaining the possibility for an equitable estoppel defense.²³¹ Finally, the Court held that a delay in bringing suit was applicable only when determining the extent of proper remedies in the event that the plaintiff won.²³²

In his dissent, Justice Breyer focused on laches’ use to battle inequity in cases that do not fit neatly within established rules at law.²³³ Though much of his analysis focused on very lengthy delays in bringing suit, he did note other considerations such as delays in bargaining for licenses and general “inequity of permitting the action to go forward.”²³⁴ He also considered the legislative history indicating that Congress chose not to include equitable remedies in the Copyright Act because it relied on courts wielding that power when applicable, as they had previously done.²³⁵ Finally, Justice Breyer cautioned against expecting the estoppel doctrine to sufficiently protect against inequity in cases with facts traditionally associated with the delay required for a laches defense.²³⁶

The Court’s decision to functionally eliminate laches from the copyright context is likely to harm creative industries and place significant burdens on potential defendants, particularly those who are less sophisticated actors, in potential negotiations.²³⁷

III. AN ARGUMENT FOR RE-EVALUATING CONSENT AND IMPLICIT LICENSING FOR POTENTIALLY VIRAL USER-GENERATED CONTENT

The breakdown in negotiations that Netflix and the creators of “The Unofficial Bridgerton Musical” experienced highlights the dangers of allowing parties to negotiate privately without clearer expectations in place from the Copyright Act.²³⁸ Although Netflix technically had every legal right to partially

²³⁰ *Petrella*, 572 U.S. at 682 (rejecting the defendant’s argument that laches protects against copyright holders simply biding their time, with full knowledge of infringement, until they can determine if the infringer’s investment in the ensuing work garners sufficient benefit to favor legal action). The Court reasoned that it is perfectly acceptable for copyright holders to delay bringing a suit until the secondary work clearly endangers the original’s monetary worth. *Id.*

²³¹ *Id.* at 682–84.

²³² *Id.* at 687.

²³³ *Id.* at 688 (Breyer, J., dissenting).

²³⁴ *Id.* at 689–92; see also *supra* note 108 (defining “laches” to include simply an unreasonable delay resulting in harm).

²³⁵ *Petrella*, 572 U.S. at 694 (Breyer, J., dissenting) (quoting S. REP. NO. 85-1014, at 2–3 (1957)).

²³⁶ *Id.* at 699.

²³⁷ Jordyn Ostroff, Note, *Petrella v. Metro-Goldwyn-Mayer, Inc.: Is Equity in Copyright Law Down for the Count?*, 30 BERKLEY TECH. L.J. 965, 979–80 (2015) (explaining that by eliminating laches from copyright, the *Petrella* Court imposed higher burdens on potential infringers to engage more proactively in “copyright clearance” endeavors). This looming burden could prove too onerous and lead to a “chilling effect” in creative communities that fear investment in creative works that may be litigated upon becoming profitable. *Id.* at 981.

²³⁸ Compare *supra* notes 156–161 and accompanying text (describing how the “Ratatousical” creators coordinated successfully with Disney), with *supra* notes 162–181 and accompanying text

acquiesce to “The Unofficial Bridgerton Musical” as it did, copyright law should have safeguards in place.²³⁹ Specifically, both parties would be better served by copyright doctrines encompassing the realities of corporate copyright holders transacting with fans, who are less-sophisticated parties.²⁴⁰ With clearer expectations and outcomes as the framework and the reasonable reliance of parties as the goal, copyright law would more realistically accommodate user-generated fan content with the capability of viral popularity if it adjusted its view of consent.²⁴¹ Even if Barlow and Bear had not pursued opportunities with “The Unofficial Bridgerton Musical” beyond TikTok itself, the distinction between merely posting content online and potential commercialization is no longer valid.²⁴²

(describing that Barlow and Bear’s attempted negotiations with Netflix were ultimately unsuccessful for “The Unofficial Bridgerton Musical”).

²³⁹ See Lantagne, *supra* note 145, at 507 (explaining that power imbalances between copyright holders and online fandoms are made even worse in situations where there are no clear rules in place, because copyright holders will often overstate their rights with the goal of removing the user’s opposition); Hickey, *supra* note 103, at 398 (providing that affirmative consent is the only form of consent currently permitted within copyright analyses).

²⁴⁰ See Lantagne, *supra* note 145, at 507–08 (explaining that fandoms receive very little information to guide them or help them protect themselves, providing the example of the Conan Doyle Estate as a copyright holder that bamboozled a less-sophisticated user by asserting he had infringed on a work that was, in fact, in the public domain). In addition, fan communities should also take steps to improve their position within negotiations and litigation. Romanenkova, *supra* note 56, at 210–11 (arguing fan communities could resolve some concerns they face when confronting copyright issues if they were better-organized with more robust representation).

²⁴¹ See Hickey, *supra* note 103, at 427 (explaining that user reliance on non-affirmative types of consent should be an important consideration to infringement cases, albeit in a fair use context, especially to disincentivize opportunistic copyright owner behavior); *supra* notes 152–154 and accompanying text (discussing the ability of TikTok to launch videos into viral success and highlighting the uncertainty that creators will profit from their work); *supra* notes 162–181 and accompanying text (explaining how Netflix acquiesced to a work that began as non-commercial but quickly found itself in murky waters when that work became more commercial).

A particular uncertainty seems to exist for TikTok works because, on one hand, creators are not guaranteed success through the app, but on the other, the potential for commercialization if the algorithm looks favorably upon a video is ever-present. See *supra* notes 152–154 (discussing this duality of success and uncertainty inherent to creating on TikTok). Though going viral is not necessarily a sign of commercialization itself, it nevertheless provides the opportunity to monetarily benefit from the work. See *supra* note 154 (explaining that posting on TikTok is not particularly lucrative per view, but that exposure on the app provides creators opportunities for brand and music sponsorship deals).

²⁴² See Whateley, *supra* note 154 (describing how TikTok videos can make certain creators money). Specifically, even if viewership on the app does not directly lead to a large payout on the basis of payment per view, engaging with TikTok still provides creators the opportunity to leverage their platforms to gain lucrative brand sponsorships. *Id.* Thus, TikTok has allowed creators to stray far from the traditional understanding of personal user-generated content to a kind of commercial grey area. See Adler & Fromer, *supra* note 150, at 457 (describing that although modern internet culture renders the line between commercial and personal works obsolete—because the works can be “indirectly monetizable”—copyright nevertheless maintains the distinction in its analysis); *supra* note 147 and accompanying text (explaining the common “gift-giving ethos” of many fan communities that rely on the concept of openly available but also free content as the cornerstone of user-generated content online).

It is reasonable to impute knowledge of the current social media landscape onto corporate copyright holders such as Netflix and Disney.²⁴³ Importantly, considering social norms can help create a plan on which users and copyright holders alike can reasonably rely.²⁴⁴ Given the popularity and prevalence of TikTok and its competitors in the public eye, it is time for copyright law to embrace an understanding that the line between commercial and non-commercial user-generated content is not easily defined nor easy to reasonably anticipate in the long-term.²⁴⁵ This is particularly true given the variety of ways in which TikTok can assist internet creators in commercializing their work.²⁴⁶

Although Netflix appears to have acted in good faith with Barlow and Bear, an examination of its correspondence with them reveals that its attempts to negotiate spiraled beyond its control quickly and unexpectedly.²⁴⁷ It is possible that

²⁴³ See *supra* notes 5–6 and accompanying text (explaining that an official Disney account contributed to the viral *Ratatouille* musical TikTok phenomenon); Newman, *supra* note 86, at 529–31 (arguing for a finding of implied licenses when a copyright holder engages in a “majoritarian default” or social norm that it should have known would imply consent for a license). There exists an argument for why positioning intellectual property within a broader framework of cultural norms is important for breaking down historic power imbalances and revitalizing the jurisprudence. See generally Elizabeth L. Rosenblatt, *IP Law in the Shadow of Norms*, 40 CARDOZO ARTS & ENT. L.J. 657 (2023).

²⁴⁴ See Chik, *supra* note 198, at 265–66 (providing examples where “particular customs, usages, and social practices” have been incorporated into common law, such as the reasonable man in torts, the acceptance of implied terms in contract formation, and the concept of common law marriage); Gervais, *supra* note 142, at 854–55 (explaining that copyright does not currently address the common “social norms” within fan communities that have attempted to self-regulate). At the moment, fans’ unofficial derivative works reside in a copyright grey area without much precedent or certainty. Gagliardi, *supra* note 2, at 154.

²⁴⁵ See *supra* notes 142–154 and accompanying text (discussing first the traditional nature of user-generated content and then the immense popularity of, and uncertain commercialization potential for, creators on TikTok). This is especially true given the statute’s definition of “financial gain” as not only receiving, but even expecting to receive, some unspecified benefit. See 17 U.S.C. § 101 (defining “financial gain”). Courts include that in their analysis of the first fair use factor, the purpose of the defendant’s use, and it is likewise relevant to a consideration of how TikTok changes concepts of commerciality and financial purpose, as the app allows for various ways to anticipate future value or receive value from previously non-commercial acts, such as uploading short clips to the internet. See *supra* note 125 and accompanying text (describing the definition of financial gain within the first factor analysis in a fair use case); *supra* notes 152–154 and accompanying text (explaining that a TikTok can garner enormous viewership for its creators and acknowledging that the company provides a variety of methods through which creators can financially gain).

²⁴⁶ See *supra* note 154 and accompanying text (describing the various mechanisms through which TikTok creators can earn money for their videos).

²⁴⁷ See Complaint, *supra* note 17, at 14 (describing how Netflix passively acquiesced to Barlow and Bear by stating it was “not approving or authorising” the requests but also would not impede them and subsequently felt the need to reach out and clarify its expectations); *id.* at 15–16 (explaining that by the time Netflix wanted to object to Barlow and Bear’s specific conduct at The Kennedy Center, it was too late because the pair no longer sought its permission in any form). In Spring 2022, just months before Netflix sued Barlow and Bear, Paige Gagliardi published an article in the *Washington Journal of Law Technology and Arts* wherein she discussed Disney’s approach to the “Ratatouiscial” and in many ways foreshadowed this Note. See Gagliardi, *supra* note 2, at 159 (“[T]his unprecedented

Netflix could have, and perhaps should have, immediately offered Barlow and Bear a license to use its work to avoid the later litigation.²⁴⁸ The grey area Netflix was attempting to traverse was rife with metaphorical landmines, and unfortunately, one was triggered as Barlow and Bear seemed to grow in confidence.²⁴⁹ What happened to Netflix, following its attempts to exist in a grey area of copyright consent, does not fall squarely within any of the supposed consent taxonomies.²⁵⁰ Accordingly, it becomes evident that modern situations have placed copyright holders in the unenviable position of juggling a sort of pseudo-consent not even considered by scholars for copyright analysis.²⁵¹

departure from Disney's former copyright regulation, combined with the blessing from Disney for the . . . 'Ratatouille' Musical, signals the opening of a door to unregulated use of copyrighted material by fans. *This is a door Disney and other IP holders may soon wish to . . . close.*" (emphasis added)). After all, not all copyright owners can be as lucky as Disney was with the "Ratatosical." See *supra* notes 162–181 and accompanying text (explaining Netflix's unsuccessful attempts to clarify expectations with Barlow and Bear).

²⁴⁸ See Complaint, *supra* note 17, at 14, 16 (explaining that Netflix did not discuss providing Barlow and Bear a license until it appeared as though the pair had grown emboldened by the company's partial acquiescence). There are, however, possible explanations for Netflix's delay in filing its suit. See Despain, *supra* note 146, at 362 (suggesting that fandoms have a lot of visibility and power online, which can militate against copyright owners suing them); Gagliardi, *supra* note 2, at 160 (suggesting that Netflix may have avoided litigating "The Unofficial Bridgerton Musical" for so long either because it believed the musical reflected well on the show, it was exhibiting genuine good faith, or it recognized that it was an unwise public relations tactic to litigate a claim against Barlow and Bear during the COVID-19 pandemic).

²⁴⁹ See Newman, *supra* note 86, at 559 (arguing that it is reasonable to conclude there is consent to use copyrighted work based on societal customs that copyright owners must either eschew or clarify if they wish to clearly avoid implying a license); Complaint, *supra* note 17, at 16 (discussing the instance where Barlow and Bear's representative relayed that the duo no longer believed they required Netflix's consent to act). Such landmines do not only pertain to consent and licensing, but also to the reliability of a fair use defense. See Gagliardi, *supra* note 2, at 169 (listing various factors relevant to social media use of copyrighted content, including "incongruous corporate responses," that complicate predictions of fair use defense claim success).

²⁵⁰ See Hickey, *supra* note 103, at 428–32 (describing the spectrum of acknowledged forms of consent). Netflix itself alluded to the negotiations existing in a grey area of consent. See Travis, *supra* note 18 (providing Netflix's public statement upon filing the suit, which explicitly mentioned that Barlow and Bear were commercializing their work absent any "formal permission" to use Netflix's copyrighted material).

²⁵¹ See *supra* note 250 and accompanying text (explaining that Netflix relied on concepts of formal permission to defend its copyrights after private ordering failed); Complaint, *supra* note 17, at 14 (describing the informal permission Netflix first provided Barlow and Bear while negotiating). Consequently, the line between a laches defense and an estoppel defense might not be entirely clear in this context. *But see* Ostroff, *supra* note 237, at 981 (discussing Justice Breyer's *Petrella* dissent, wherein he describes the doctrines as "fundamentally different" because estoppel requires "active misrepresentation," and laches requires "unreasonable delay"). Netflix might not have "actively" misrepresented its intentions to Barlow and Bear, but it may have ultimately caused an "unreasonable" delay nonetheless. See *supra* notes 169–181 and accompanying text (discussing Netflix's explanation of how its communication with Barlow and Bear became muddled and eventually devolved). Netflix's assumption that the work would remain a *de minimis* infringement, despite the momentum in online culture, may have contributed to an unintentional but unreasonable delay that ultimately harmed Barlow and Bear. Cf. Ostroff, *supra* note 237, at 981 (contrasting traditional notions of estoppel and laches).

When fan communities and traditional copyright holders clash, there must be more guidance in the statute from which they can derive clearer expectations.²⁵² Courts undertaking copyright infringement analyses should be able to take laches and acquiescence into account, without regard for bad faith, to find implied licenses.²⁵³ Then, when copyright holders initially decide how to communicate with fans using their copyrighted work, they can proceed with a clear understanding of how their conduct can be reasonably construed, and be held accountable to that knowledge.²⁵⁴ Some may argue that this approach would stifle licenses by encouraging copyright holders to forbid all use of their

²⁵² See Gervais, *supra* note 142, at 853 (explaining that although large companies “tend to follow copyright rules as a business decision and as a matter of basic risk assessment,” fans and individual internet creators “must internalize the norm [or else] huge, and sometimes futile, enforcement efforts are required”); Gagliardi, *supra* note 2, at 170 (explaining that without explicit rules in this area, people will continue to fall back on the fair use doctrine to excuse their copying, whether it would likely prevail in court or not); Chik, *supra* note 198, at 250 (describing the unclear world of user-generated content that provides no useful counsel for fans encountering a “murky” and “hostile” legal climate); *Petrella v. MGM*, 572 U.S. 663, 675–76 (2014) (explaining that the District Court and Court of Appeals for the Ninth Circuit both held that the defendant had been harmed by unrealized expectations and thus upheld its laches defense).

²⁵³ See *supra* notes 96–114 and accompanying text (describing implied licenses and how they currently differ from the equitable considerations mentioned); *supra* note 108 and accompanying text (defining “laches”). But see *Petrella*, 572 U.S. at 685–86 (explaining that courts should consider laches defenses only in the rarest, most extraordinary circumstances).

²⁵⁴ See Newman, *supra* note 86, at 558 (“[W]e can understand the doctrine of implied license as one that seeks to allocate informational burdens so as to facilitate private ordering based on the principle of owner control . . . [to] discourage owners from opportunistic use of their exclusive rights.”); *supra* note 252 (providing other sources that indicated more guidance is needed in this area). This is not to say that under this proposed change Netflix would have lost in the case at issue. See *supra* note 175 and accompanying text (providing an example of Barlow and Bear flagrantly ignoring Netflix’s boundaries during negotiations). Rather, the emphasis is on everyone understanding the potential dangers of the path ahead such that no party’s actions confuse or embolden the other in response. Cf. *supra* notes 170–175 and accompanying text (demonstrating that as Netflix partially, and cryptically, acquiesced to Barlow and Bear’s request and the public continued to embrace “The Unofficial Bridgerton Musical,” Barlow and Bear transitioned from requesting permission, to telling Netflix what they planned to do, to eventually informing Netflix that they no longer sought its permission). This is particularly true given that copyright holders can overcome an otherwise successful laches defense if they can prove the secondary user’s infringement was willful, which would allow a fact-specific approach to the consent allegedly given. See Didwania, *supra* note 229, at 1232 (explaining the “willful infringement exception” to laches).

Although it is true that a laches analysis in a case such as *Netflix Worldwide Entertainment, LLC v. Barlow* would differ significantly even from what Justice Breyer focused his 2014 *Petrella v. MGM* dissent on, the combination of acquiescence, laches, and equitable estoppel analyses together should point courts in a logical direction for cases when the delay was considerably shorter. See *supra* notes 233–236 (explaining Justice Breyer’s focus on extremely long delays for laches defense, but also inequity and other considerations); *supra* note 108 (providing the definition of “laches,” which does not specify how long one must delay before the doctrine attaches, but rather describes it in terms of reasonableness, implicitly a fact-specific issue). Furthermore, this approach would be consistent with some circuits’ more flexible approach to identifying implied licenses. Cf. *supra* notes 98–102 and accompanying text (explaining the lack of cohesion among circuits on identifying implied licenses and discussing how the First Circuit alluded to a more common sense approach to the issue).

work, but it instead incentivizes the party with more bargaining power to make clear what it absolutely will not tolerate.²⁵⁵ Additionally, compulsory licenses, which some scholars argue for, may not take into account the reality that some viral derivative work sensations remain non-commercial, and thus fit somewhat comfortably within the current framework.²⁵⁶ Though equitable defenses such as laches are historically judge-made, there is precedent for Congress including them as statutorily defined defenses in the Lanham Act, which controls trademarks.²⁵⁷ Adding this statutorily would circumvent Justice Ginsburg's primary concern in *Petrella* that laches should not interfere with a statute of limitations because it would be at the behest of Congress rather than individual judges.²⁵⁸

Ultimately, rather than focus on changes to the fair use doctrine, that has proven itself to be fickle and unreliable, it is prudent to instead align parties' expectations through a statutory amendment that broadens the concept of implied licenses to include laches and acquiescence in social media contexts.²⁵⁹

²⁵⁵ See Newman, *supra* note 86, at 558 (explaining that such a view of implied licenses from some form of acquiescence takes into account the power and control that copyright holders have during negotiations); *cf. supra* note 211 and accompanying text (explaining how Paramount and Warner Brothers successfully delineate for fans what conduct they will and will not litigate). Additionally, the fair use doctrine would still act as a guard against an unchecked impact of this potential consequence. See *supra* notes 115–141 and accompanying text (explaining the fair use doctrine as a defense to what would otherwise be infringing uses).

²⁵⁶ See *supra* notes 157–161 and accompanying text (describing how the “Ratatousical” remained relatively non-commercial despite its popularity on TikTok); *supra* note 209 (describing proposed statutory amendments to create compulsory licenses). Compulsory licenses are also not normatively desirable, as private ordering can work when expectations are sufficiently clear. See, e.g., *supra* note 211 and accompanying text (explaining how Paramount and Warner Brothers clearly demarcate the conduct that they will litigate and the conduct that they will not).

Compulsory licenses are ultimately insufficiently malleable to account for the vast array of possibilities that can come from works housed on social media. See Morrison, *supra* note 209, at 94–96 (describing compulsory statutory licenses as a “mandatory” license, implying that they are not flexible) (emphasis added)). Nevertheless, compulsory licenses may represent a step in the right direction in that they simplify transacting for permission. *Id.* at 95. They would require, however, that the fans pay a set fee for their use, which may still bar the average online creator from participating. See *id.* at 87, 106 (explaining that a compulsory derivative work license would entitle the original author to payment and only remove his or her right to permit or deny use and arguing that it would be important to not set too high a fee that would preclude many smaller creators from participating).

²⁵⁷ *Petrella*, 572 U.S. at 678 & n.15; 15 U.S.C. § 1115(b)(9).

²⁵⁸ See *supra* notes 229–230 and accompanying text (identifying Justice Ginsburg's concern about the interplay between the applicability of the statute of limitations and court-determined laches); Mark Marciszewski, *When Will It End? Why There Is No Practical Statute of Limitations for Online Copyright Infringement and Why Libel Law Can Offer the Solution*, 27 RICH. J.L. & TECH. 1, 46–50 (2020) (arguing for a statutorily permissible laches defense in defiance of the *Petrella* decision, among other solutions, but focusing on long periods of delay and online activity).

²⁵⁹ See Jamar, *supra* note 188, at 870 (arguing for a bright-line rule to supplant fair use in the context of user-generated content in social media because fair use defies reasonable reliance until litigation is complete); Chik, *supra* note 198, at 254 (explaining that the fair use doctrine is better suited for the analog age in which it was created rather than the modern internet era because of its

CONCLUSION

TikTok and other modern social media platforms have all-but obliterated the line between non-commercial online fan content and commercial professional works. When two young women experimenting with music online can produce a musical phenomenon that wins them a GRAMMY Award and fills concert halls of adoring fans, it is time for copyright doctrines to adjust accordingly.

The Constitutional mandate that copyright endorse public creativity dictates copyright law's purpose. Certainly, this purpose is a noble one, but the modern era has plunged it into uncertainty. Now that copyright law must contend with the might of social media platforms, with their complicated paths to commercialization and enormous potential for fans to gain fast recognition, the balance between the creative rights at stake is more fraught than ever. Unfortunately, the fair use defense is insufficient in these contexts and the derivative works right muddies the waters for reasonable reliance goals. Through an analysis of Netflix's attempt to coordinate with Abigail Barlow and Emily Bear within the gray area allowed under copyright's current understanding of consent, this Note demonstrates that Congress must again amend the Copyright Act to provide fairer rules. It can accomplish this by expanding the concept of implied licenses and the forms of consent that implicate them, as well as through delineating the actions that copyright holders should avoid so as to not wield their derivative works right inefficiently and confusingly.

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basis in the 1841 *Folsom v. Marsh* decision). With technology changing as quickly as it does, the law needs a faster solution than waiting for common law doctrine to evolve. See Chik, *supra* note 198, at 255 (explaining that a statutory solution provides more stability and obvious applicability). Specifically, Congress could amend 17 U.S.C. § 507(b) to say something to the effect of: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued. Civil actions brought within the three years may be subject to the affirmative defenses of laches, acquiescence, and equitable estoppel." See 17 U.S.C. § 507(b) (containing the current limitations language without mention of the equitable doctrines).

