NOTES

COPYRIGHT X TIKTOK: SYNC RIGHTS IN THE DIGITAL AGE

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Synchronization (sync) licenses are required for works in which music is synchronized to video and generally have high transaction costs because they must be individually negotiated. Traditionally, sync licenses were obtained by sophisticated parties for movies, television, commercials, and the like. But digital platforms like TikTok have brought sync licenses from obscurity into the hands of every person with a smartphone.

This transformative innovation has created new issues for copyright law. First, user-generated content (UGC) created by individuals and shared on the internet via social media platforms or websites may require sync licenses that are cumbersome to negotiate and overinclusive. Private agreements between platforms like TikTok and record labels and publishers usually fill the gap, allowing most users to play music with their videos free from concern about copyright infringement. However, these licenses do not account for copyright's fundamental balance between access and exclusivity because they are overinclusive: Some content on TikTok may be covered by the doctrine of fair use, in which case no license is required. Fair use is an affirmative defense to copyright infringement that permits the defendant to use the copyrighted work without paying the rightsholder.

Second, TikTok's agreements with labels and publishers could be eroding fair use. The ex-post nature of fair use means that risk-averse parties, when confronted by a situation in which the viability of their claim is unclear, are likely to obtain a license not required by law. This in turn can narrow the scope of fair use because the existence of an active licensing market makes it less likely that a court will find a use is fair. Future

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The letter "x" is a contemporary signifier of a collaboration, typically between brands or designers. *See* Hannah Batten, *Brand x Brand: The Rise of the Brand Collaboration*, FOOT ANSTEY (July 24, 2023), https://www.footanstey.com/our-insights/articles-news/brand-x-brand-the-rise-of-the-brand-collaboration [https://perma.cc/27LD-26FU].

parties then become less likely to rely on an increasingly dubious fair use defense. In the TikTok context, doctrine about fair use and sync is especially uncertain. The scant precedent in UGC fair use cases appears to be highly fact-dependent, there are few cases that specifically deal with sync rights, and none of those have decided fair use as applied to sync.

This Note proposes a blanket, compulsory license for noncommercial UGC sync as an imperfect solution to help correct the balance of copyright in the digital platform era. The compulsory license would return review of public copyright law back to Congress and courts and prevent private ordering from curtailing fair use. Further, valuable creativity would be protected because rightsholders would not be able to withhold permission for use of copyrighted material.

INTRODUCTION

It is not for nothing that TikTok's logo is a stylized musical note.[1] TikTok is a powerful music discovery and marketing tool that has the

[1] *See What's the Inspiration Behind the TikTok Logo?*, TIKTOK CAREERS (Dec. 3, 2019), https://careers.tiktok.com/blog/detail/136 [https://perma.cc/K8AQ-RMPA].

potential to propel any musician to stardom.[2] In 2022, songs "driven by trends on TikTok" dominated the *Billboard* Hot 100.[3] The musician Lil Nas X's obscure, self-released song "Old Town Road" became a huge hit after a TikTok user's dance to the song went viral.[4] This popularity inspired a Billy Ray Cyrus remix that broke records by holding the top spot on the *Billboard* Hot 100 for nineteen weeks; Lil Nas X has continued to thrive after signing with Columbia Records.[5] The TikTok videos that popularized Lil Nas X's music were a form of user-generated content (UGC), which is any form of original content created by an individual—as opposed to a platform—that is shared on the internet via social media platforms or websites.[6]

While explosive popularity driven by UGC on TikTok and elsewhere can benefit the music industry,[7] TikTok-platformed creativity may be at

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[2] *See* John Seabrook, *So You Want to Be a TikTok Star*, New Yorker (Dec. 5, 2022), https://www.newyorker.com/magazine/2022/12/12/so-you-want-to-be-a-tiktok-star [https://perma.cc/HAY5-4U9L].

[3] *Year on TikTok: 2022, Truly #ForYou*, TikTok (Dec. 6, 2022), https://newsroom.tiktok.com/en-ca/year-on-tiktok-2022-truly-foryou-ca [https://perma.cc/VAW9-TQ8U]; Kenan Draughorne, *As Government Threatens TikTok Shutdown, the Music Industry Holds Its Breath*, L.A. Times (Mar. 28, 2023, 3:14 PM), https://www.latimes.com/entertainment-arts/music/story/2023-03-28/tiktok-shutdown-music-business-artists [https://perma.cc/7R3P-8WE9].

[4] *See* Seabrook, *supra* note 2 (noting that Lil Nas X recognized the TikTok creator's contribution with $500 and an expression of personal gratitude).

[5] *See id.*; Tim Ingham, *Everybody Wants Some (Hits)!!*, Rolling Stone (June 15, 2021), https://www.rollingstone.com/pro/features/diy-music-vs-record-labels-1179711 [https://perma.cc/2WF2-DAED].

[6] *See* Nicholas Thomas DeLisa, *You(Tube), Me, and Content ID: Paving the Way for Compulsory Synchronization Licensing on User-Generated Content Platforms*, 81 Brook. L. Rev. 1275, 1279 n.26 (2016) (defining user-generated content). User-generated content (UGC) is "any digital content that is produced and shared by end users of an online service or website. . . . [B]ut it is not produced by the website or service itself." Margaret Rouse, *User-Generated Content*, Techopedia (Nov. 28, 2023), https://www.techopedia.com/definition/3138/user-generated-content-ugc [https://perma.cc/8NZ4-LHM9]. Some scholarship is dedicated to a technical definition of the term, but further definition is unnecessary for the purposes of this Note. *See, e.g.*, Marcelo Luis Barbosa dos Santos, *The "So-Called" UGC: An Updated Definition of User-Generated Content in the Age of Social Media*, 46 Online Info. Rev. 95, 108 (2022) (defining UGC as "any kind of text, data or action performed by online digital systems users, published and disseminated by the same user through independent channels, that incur an expressive or communicative effect either on an individual manner or combined with other contributions from the same or other sources").

[7] *See infra* Sections I.C, II.B. *See generally* Dan Whateley, *How TikTok Is Changing the Music Industry and the Way We Discover New, Popular Songs*, Bus. Insider (Dec. 22, 2023, 11:18 AM), https://www.businessinsider.com/how-tiktok-is-changing-the-music-industry-marketing-discovery-2021-7 [https://perma.cc/6XEP-YP4P] ("Songs that trend on TikTok often end up charting on the Billboard 100 or Spotify Viral 50. And 67% of the app's users are more likely to seek out songs on music-streaming services after hearing them on TikTok . . . ."); Seabrook, *supra* note 2 (noting that "creators' . . . videos could potentially spread a piece of the song to hundreds of millions of listeners, who might then stream the original version on another platform.").

risk. Common types of TikTok videos with coordinated movement and music could implicate a copyright holder's exclusive right to synchronize a song to a video.[8] Copyright law generally requires that the prospective user of a song acquire a license for this synchronization.[9] But when it comes to social media, much UGC likely falls into a doctrinal gray area in which it is unclear whether or not a license is required—either because the song is not truly synced in timed-relation to the video, or because the UGC is not infringing due to an exception such as fair use.[10]

Fair use is an affirmative defense to copyright infringement that acts as a "safety valve" to help copyright maintain the balance between restricting usage so that creators get paid and are incentivized to create works in the first place, and disseminating expressive works for the public to access and build upon to create new works.[11] Problematically, it can be difficult ex ante to determine whether a use meets the test, such that many risk-averse users of a copyrighted work are likely to choose to obtain a license rather than face a copyright infringement lawsuit.[12] Such acquisition of unnecessary licenses can, in turn, encourage courts to narrow the application of fair use in that context, because the existence of an active licensing market weighs against fair use.[13]

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[8] *See* Michael P. Goodyear, *Synchronizing Copyright and Technology: A New Paradigm for Sync Rights*, 87 Mo. L. Rev. 95, 123–25 (2022). This right was historically invoked to require licenses for movies, television, and commercials. *Id.*

[9] *See id.*

[10] *See infra* Section II.A.; *see also* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale L.J. 882, 884–85 (2007) (explaining that the copyright doctrines limiting private rights are "inherently ambiguous" and that the resulting doctrinal gray areas make it difficult for potential users of copyrighted material to decide ex ante whether to secure a license, causing risk-averse parties to secure licenses even when they are not needed). The combination of the music and video in timed-relation for dance, lip sync, and other similar videos popular on TikTok is what is likely to trigger the sync right. *See infra* Section I.B.2.

[11] *See generally* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 Stan. L. Rev. 915, 933–35 (2020) ("Fair use, in contrast [with compulsory music licensing], is often analyzed through the unique policy objectives that copyright is designed to facilitate, in particular how best to ensure authors have incentives to create while avoiding the social costs . . . that can occur when the public's access to creative works is overly restricted."); *see also infra* Section I.A.

[12] *See* Gibson, *supra* note 10, at 890 ("In these circumstances [with a prohibitively high price of making the wrong call], even a risk-neutral actor with a good fair use claim would choose to secure a license rather than take the small risk of incurring a severe penalty.").

[13] *See id.* at 895–97 (describing the fair use doctrine's effect on existing licensing practices, such that a court's determination of fair use will consider "whether there already exists a licensing market for the use in question," and that "when established practice shows that consensual transfer is possible—i.e., when the particular use is in fact consistently licensed—the fair use defense is unavailable").

TikTok has protected itself and its users from liability by entering into contracts with the major publishers and labels,[14] though its agreement with Universal Music Group (UMG) has recently lapsed and music from artists it represents has been removed from the app.[15] But if at least some of the UGC on TikTok is fair use, does not implicate the sync right, or both, then those sync licenses are an unecessary expense. Further, as illustrated by the collapse in negotiations with UMG, the continuance of these licenses is not guaranteed, and users could be left without access to music.[16] Private ordering by contract of a doctrinal gray area can have the effect of shaping public law by influencing fair use decisions and hardening the edges of mushy sync doctrine.[17] Doctrinal clarification is a task better left for Congress and courts—while private licenses remedy the transaction costs associated with sync licenses, they do not account for copyright policy and the balance between access and exclusivity.[18]

Permitting private contracts between platforms and rightsholders could change copyright policy and restrict creativity deserving of protection.[19] This Note argues for a different approach. It shows that a blanket, compulsory license for noncommercial UGC would better fill the gap and preserve the balance of copyright with public accountability.[20]

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14 *See* Colin Stutz, *TikTok Now Has Short-Term Licensing Deals With the Major Labels*, Billboard (Apr. 1, 2020, 9:10 PM), https://www.billboard.com/pro/tiktok-now-has-short-term-licensing-deals-with-the-major-labels [https://perma.cc/X45R-ME7U] (reporting TikTok's deals with the Big Three labels: Universal Music Group, Sony Music, and Warner Music Group); Murray Stassen, *TikTok Inks Global Deal with Music Publishers (Who Previously Threatened to Sue It)*, Music Bus. Worldwide (July 23, 2020), https://www.musicbusinessworldwide.com/tiktok-inks-global-multi-year-deal-with-music-publishers [https://perma.cc/K3CJ-GJ8J] (reporting TikTok's multi-year licensing agreement with the National Music Publishers' Association, which represents the three "major" music publishers and the largest global independent publishers).

15 *See* Ben Sisario, *TikTok Just Lost a Huge Catalog of Music. What Happened?*, N.Y. Times (Feb. 1, 2024), https://www.nytimes.com/2024/02/01/arts/music/tiktok-universal-music-explained.html [https://perma.cc/2RQT-VCND].

16 *See id.*; *cf.* Glenn Peoples, *What's TikTok Trying to Prove by Turning Off Music in Australia?*, Billboard (Feb. 24, 2023), https://www.billboard.com/pro/tiktok-music-test-australia-what-to-prove/#! [https://perma.cc/6AFX-6TWC] (quoting a source from the music industry for the view that TikTok hoped to "downplay the significance of music on its platform" to lower expectations in TikTok's negotiations with rightsholders).

17 *See infra* Section II.A; *see generally* Xiyin Tang, *Privatizing Copyright*, 121 Mich. L. Rev. 753, 776–82 (2023) ("[P]rivately negotiated agreements do more than simply provide greater substantive rights by contract . . . . Instead, because certain doctrines—most notably, fair use—and administrative copyright proceedings specifically take industry practice into account, what parties privately contract for may also eventually affect the public, substantive law of copyright.").

18 *See* Victor, *supra* note 11, at 937.

19 *See infra* Part II.

20 At least one other Note has argued for statutory implementation of compulsory licenses for UGC sync on digital platforms as a reasonable extension of the compulsory mechanical

Part I provides background on copyright and music licensing, the unregulated status of synchronization rights, and TikTok's important and complementary relationship with the music industry. Part II argues that private ordering in the doctrinal gray area of sync rights does not serve to maintain the balance of copyright, but rather undermines copyright doctrine by restricting access for culturally valuable uses. Part III concludes by advocating for a blanket, compulsory license for noncommercial UGC as a tool to preserve the balance between exclusivity and access. Though the analysis for this argument rests upon a study of TikTok, the scope of this compulsory license is broad and could apply to UGC on other platforms like YouTube and Instagram.

I
Copyright, the Music Industry, and TikTok

A. The Balance of Copyright and Fair Use

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression."[21] "American copyright law exists to promote the production and dissemination of valuable creative works."[22] The primary, utilitarian rationale for copyright is that it incentivizes the creation of expressive works by granting the author exclusive rights to charge for access such that she can recoup her upfront investment.[23] However, frustrating access has social costs: Enabling creators to extract monopoly prices above the marginal cost of production can potentially cause deadweight loss by pricing out otherwise interested users, thus impeding future creativity by preventing the production of derivative

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license. *See* DeLisa, *supra* note 6, at 1301–04, 1309–11, 1318 (evaluating YouTube's Content ID policy and supporting a special compulsory synchronization license for UGC platforms to remedy transaction costs, create uniform content moderation policies across platforms, and support First Amendment considerations); *infra* Section I.B.1 (discussing the compulsory mechanical licensing regime). The novel contribution of this Note is to advocate for such a license by emphasizing the importance of UGC to the music industry and examining fair use to argue that copyright law should lead, rather than follow, private ordering.

21 17 U.S.C. § 102(a); *see also* Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 Wash. L. Rev. 615, 619 (2015).

22 Fromer, *supra* note 21, at 619.

23 *See* Victor, *supra* note 11, at 925–26; Fromer, *supra* note 21, at 620–21. The utilitarian (or instrumentalist) rationale is not the only proposed justification for copyright law. Some argue that utilitarianism either does not apply to all creators or is not supported in practice. *See, e.g.*, Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (And Don't)*, 55 Hous. L. Rev. 451, 477–78 (2017) (advocating for further empirical work on the link between copyright and creativity and suggesting that the relationship between the two may be complex and context-dependent); Xiyin Tang, *Copyright's Techno-Pessimist Creep*, 90 Fordham L. Rev. 1151, 1190 (2021) (noting that artists who go viral on digital music platforms often do not expect to be rewarded for their work). Discussion of alternative theories of copyright law is outside the scope of this Note.

works.[24] Offsetting these social costs is the idea that incentivizing the creation of original works in the first place provides its own social benefit.[25]

Copyright balances the "access versus incentives" tradeoff with several limiting doctrines, such as the idea-expression distinction, limits on duration, and fair use.[26] These doctrines temper exclusive rights, which limit dissemination and prevent others from using existing works to make new ones, by "ensur[ing] both that the works [copyright law] protects fall into the public domain in due course and that third parties are free to use protected works for socially valuable purposes."[27] Importantly, fair use serves copyright's utilitarian purpose by allowing for the creation of new works that make use of preexisting works

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[24] *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1578 (2009) ("[E]nabling creators to price their works at a monopoly level . . . reduces access to those works by users willing to pay a price lower than that charged by the creator, but above the marginal cost of producing it. . . . [E]xclusionary control also impedes future creativity by restricting access . . . for potential creators . . . ."); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 21–24 (2003) ("[Intellectual property] rights reduce the demand for intellectual property by inserting a wedge between price and marginal cost, creating deadweight loss that must be balanced against the disincentive effects of denying the creator of such property a remedy against copiers."); Victor, *supra* note 11, at 926 ("[C]opyright law recognizes that propertization has the potential to allow copyright owners to charge a premium for works, which restricts public access and generates social costs.").

[25] LANDES & POSNER, *supra* note 24, at 20–21.

[26] *See id.* at 20, 93, 97 (describing the "access versus incentives" tradeoff as a result of the dynamic benefit of intellectual property rights); Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887, 1887–88 (2021) ("Copyright's fair use doctrine is often considered one of several 'safety valves' that prevent copyright's system of exclusive rights from undermining its foundational policy agenda."); Victor, *supra* note 11, at 927 ("[C]opyright entitlements are time-limited, meaning that works will enter the public domain, available for use by anyone, after a certain amount of time."); Fromer, *supra* note 21, at 620 ("Pursuant to utilitarianism, the rights conferred by copyright are designed to be limited in time and scope."); Andy Warhol Found. for the Visuals Arts, Inc. v. Goldsmith, 598 U.S. 508, 526–27 (2023) ("This balancing act between creativity and availability (including for use in new works) is reflected in one such limitation, the defense of 'fair use.'"). The idea-expression distinction is a doctrine which excludes from the scope of copyright "any idea, procedure, process, system, method of operation, concept, principle, or discovery," while the expression of such an idea is protected. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 59–60 (5th ed. 2023), http://copyrightbook.org [https://perma.cc/QUV8-58WZ] (citing 17 U.S.C. § 102(b)). The general policy rationale behind the idea-expression doctrine is that "the basic building blocks of expression ought to be left freely available for anyone to use." Jeanne C. Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71, 98 (2014). Additionally, copyright terms are of limited duration (which vary based on a complex set of rules), after which the work will shift into the public domain to be used by anyone. *See* FROMER & SPRIGMAN, *supra*, at 177–80.

[27] Fromer, *supra* note 21, at 621–22 (noting examples such as "news reporting, critical reviews, [and] . . . parodies that might cast an unfavorable light on an original work or uses for which the transaction costs are too great for the copyright owner to agree to a licensing arrangement").

without competing with the original—even if the borrower does not have a license.[28]

Fair use is an affirmative defense to copyright infringement that permits the defendant to use the copyrighted work without paying the copyright holder.[29] When considering whether an alleged infringement might be fair use, courts consider the Copyright Act's non-exclusive set of factors: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;" (2) "the nature of the copyrighted work;" (3) the "amount and substantiality" of the work used; and (4) the effect of the use on the market for or value of the original.[30] The preamble to the Copyright Act suggests several purposes that are likely fair use, including "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[31] For example, in a seminal Supreme Court fair use case, *Campbell v. Acuff-Rose Music, Inc.*, the Court held that 2 Live Crew's derivative rap parody of Roy Orbison's "Oh, Pretty Woman" was fair use, even though 2 Live Crew sold thousands of copies of the song and was explicitly denied permission by the rightsholder to make such a parody.[32]

The *Campbell* Court grounded its fair use determination in its finding that 2 Live Crew's parody was "transformative" commentary on the original work, the value of which outweighed the commercial aspect of the use.[33] Though not expressly in the text of Copyright Act, courts have incorporated into the first factor an analysis of "whether and to what extent" the secondary use is transformative because it is "relevant to whether the new use serve[s] a purpose distinct from the original, or instead supersede[s] its objects."[34] Transformative uses "add[] something new, with a further purpose or different character, altering the first with

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[28] *See id.* at 621.

[29] *See* 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright."); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 433 (1984) ("[A]nyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use."); Victor, *supra* note 26, at 1894; RESTATEMENT OF COPYRIGHT § 6.12 (AM. L. INST., Tentative Draft No. 5, 2023) (on file with author). Courts treat fair use as an affirmative defense, though the statutory language could be interpreted to mean that part of plaintiff's prima facie case for infringement is proving that the use was not fair use. RESTATEMENT OF COPYRIGHT, *supra*, § 6.12.

[30] 17 U.S.C. § 107.

[31] *Id.*; Victor, *supra* note 26, at 1894.

[32] 510 U.S. 569, 571–73 (1994).

[33] *See id.* at 578–85 (noting that "parody has an obvious claim to transformative value").

[34] *Campbell*, 510 U.S. at 579; Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 542–43 (2023); *see also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 156 U. PA. L. REV. 549, 603–04 (2008) ("Courts and commentators have since spoken of the concept of transformativeness as the cynosure of fair use analysis . . . .").

new expression, meaning, or message."[35] This is a "matter of degree, and the degree of difference must be balanced against the commercial nature of the use."[36] The transformative use analysis allows courts to "weigh whether or not a new use is novel or culturally valuable enough to exempt it from copyright protection or whether allowing the use to go forward would unduly harm the copyright owner financially and thus risk undermining copyright's incentive function."[37]

Fair use acts as a strong, internal limitation that can both justify expanding the scope of copyright,[38] and provide "breathing space within the confines of copyright" for culturally valuable transformative uses to help preserve the balance of the access versus incentives tradeoff.[39] As explained below, the same policy considerations that motivate fair use doctrine are also reflected in the special rules for music copyright.

B. Music Copyright

This Section will provide necessary context for sync rights within the larger, complex music copyright system and offer historical precedent for the proposals in Part III.[40]

1. Copyrights in Musical Compositions and Sound Recordings

Protected musical works contain two distinct copyrights that may be held by different entities: one in the underlying musical composition created by the songwriter or composer; and one in the sound recording, which is the fixation or "embodiment" of a specific performance of the musical composition in a phonorecord.[41] The musical composition can be conceptualized as the sheet music or lyrics and the sound recording

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[35] *Campbell*, 510 U.S. at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)) (citing Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)) (internal quotation marks omitted); *see also Warhol*, 598 U.S. at 527–28 ("The first fair use factor . . . considers the reasons for, and nature of, the copier's use of an original work. . . . Criticism of a work, for instance, ordinarily does not supersede the objects of, or supplant, the work. Rather, it uses the work to serve a distinct end.").

[36] *Warhol*, 598 U.S. at 532.

[37] Victor, *supra* note 26, at 1898–99; *Campbell*, 510 U.S. at 579 ("[T]he goal of copyright, to promote science and the arts, is generally furthered by transformative works.").

[38] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003) (noting that copyright laws that expand the duration of copyright do not require heightened judicial review for First Amendment concerns because fair use is a built-in First Amendment protection).

[39] *See* Fromer, *supra* note 21, at 621; *Campbell*, 510 U.S. at 579.

[40] For a more detailed discussion of the copyrights that attach to musical works, see generally Fromer & Sprigman, *supra* note 26, at 364–89.

[41] A Report of the Register of Copyrights, Copyright and the Music Marketplace 18 (Feb. 2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/E6AB-HKF9] [hereinafter Register of Copyrights]. A "phonorecord" is the "material object in which sounds . . . are fixed . . . and from which the

as the singular performance that is recorded.[42] For example, Bruce Springsteen wrote the lyrics and music for the song "Atlantic City" in 1981 and initially owned the copyright in that musical composition.[43] In 1982, Springsteen recorded a studio performance of "Atlantic City" and released it on the album *Nebraska*; he initially owned the copyright in that sound recording.[44] The recording on *Nebraska* implicates Springsteen's rights in both the musical composition and the sound recording. But when Canadian rock group The Band recorded a version of "Atlantic City" and released it on their album *Jericho* in 1993,[45] only Springsteen's right in the musical composition was implicated; the Band initially owned the copyright in this sound recording.[46]

The owner of a copyright in a musical composition possesses the exclusive right to make or license reproductions, derivative works, distribution of copies, public displays, and public performances.[47] Traditionally, most songwriters sign these rights over to a publishing company in exchange for its distribution services, and the parties split

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sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101.

42 *See* Fromer & Sprigman, *supra* note 26, at 364.

43 *See* Peter Ames Carlin, *The Lasting Power of Bruce Springsteen's 'Nebraska*,*'* Vinyl Me, Please (Sept. 15, 2022), https://www.vinylmeplease.com/blogs/magazine/bruce-springsteen-liner-notes [https://perma.cc/Z486-3SPC]; *cf.* Fromer & Sprigman, *supra* note 26, at 365 ("Initial ownership of copyrights in musical compositions typically vests in the songwriter (or songwriters) as author (or authors) of those works."). Springsteen's catalog was split among independent publishers until he signed with Universal Music Group in 2017, then in 2021 sold all his songwriting rights to Sony Music Entertainment. Dan Rys, *Bruce Springsteen Signs Worldwide Deal With Universal Music Publishing*, Billboard (Jul. 31, 2017), https://www.billboard.com/music/music-news/bruce-springsteen-universal-music-publishing-worldwide-deal-7882127/?ref=exploration.io#! [https://perma.cc/3EJM-QBY3]; Ben Sisario, *Bruce Springsteen Sells Music Catalog in Massive Deal*, N.Y. Times (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/arts/music/bruce-springsteen-sells-music-catalog.html [https://perma.cc/B9M5-Z36Q]. For a similar example, see Fromer & Sprigman, *supra* note 26, at 365.

44 Album listing for Bruce Springsteen: *Nebraska*, Bruce Springsteen, https://brucespringsteen.net/albums/nebraska [https://perma.cc/5BU4-GRY7]. Springsteen reacquired the rights to his recording catalog from Columbia Records and retained them until he sold the rights. Ed Christman, *Bruce Springsteen In Talks to Sell Recorded Music Catalog to Sony Music*, Billboard (Nov. 2, 2021), https://www.billboard.com/pro/bruce-springsteen-talks-sony-music-sell-recorded-music-catalog [https://perma.cc/DFB9-3D3L]; Sisario, *supra* note 43.

45 Album listing for The Band: *Jericho*, Discogs, https://www.discogs.com/release/1825420-The-Band-Jericho [https://perma.cc/2J7F-QNP2] (identifying Pyramid Records as the Copyright and Phonographic Copyright holder); Mark Deming, *The Band Biography*, AllMusic, https://www.allmusic.com/artist/the-band-mn0000038490#biography [https://perma.cc/6M5C-QJSL] (providing a general overview of The Band).

46 *Cf.* Fromer & Sprigman, *supra* note 26, at 364–65 (discussing Phoebe Bridgers's 2019 recording of Tom Waits's and Kathleen Brennan's "Georgia Lee").

47 Fromer & Sprigman, *supra* note 26, at 366; 17 U.S.C. § 106(1)–(5).

the royalty revenue evenly.[48] Anyone wishing to perform a musical composition publicly must obtain a license; concert venues, radio stations, bars, restaurants, cover bands, etc. all need these licenses to play music.[49] To meet large-scale demand, almost all of these licenses are issued by large intermediaries called Performance Rights Organizations (PROs) that offer "blanket licenses," which grant public performance rights for all music compositions in the PRO's catalog.[50]

Importantly, following the Supreme Court's decision in *White-Smith Publishing Co. v. Apollo Co.*,[51] Congress enacted § 115 of the Copyright Act, which instructed that the rights to make and distribute phonorecords of all nondramatic musical compositions[52] are subject to a compulsory license.[53] Some commentators have argued that Congress was concerned that an innovative maker of piano rolls (essentially sheet music for player pianos) would gain a monopoly on the piano roll market by purchasing rights to all the music in a way that smaller companies could not.[54] Other scholars have argued that Congress may have also created the compulsory license to "reconfigur[e] the incentives/access tradeoff" by ensuring pay for copyright holders while permitting innovative technology to develop.[55] The § 115 compulsory license represents a major carveout in the exclusive rights granted by copyright. With the compulsory license, the rightsholder cannot refuse anyone who pays a small, set statutory fee to "fix" a recording of a previously released musical composition—i.e., record a cover version of a song

48 *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 220–21 (10th ed. 2019) (discussing the role of publishing companies). Today, some well-known artists make deals with publishers in which the artist retains ownership of the copyrights and most of the revenue while the publisher does more minimal licensing and administrative work. *Id.* at 223.

49 *See* FROMER & SPRIGMAN, *supra* note 26, at 369–70.

50 *See* REGISTER OF COPYRIGHTS, *supra* note 41, at 32–33 (explaining the role of PROs); PASSMAN, *supra* note 48, at 225–27 (discussing blanket licenses).

51 29 U.S. 1 (1908).

52 A nondramatic musical composition is one "that was not created for use in a motion picture or a dramatic work, such as a ballad intended for distribution solely on an album or an advertising jingle intended solely for performance on the radio." U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 802.2(A) (3d ed. 2021).

53 *See* Kal Raustiala & Christopher Jon Sprigman, *Scales of Justice: How a Terrible Supreme Court Decision About Player Pianos Made the Cover Song What It Is Today*, SLATE (May 12, 2014, 10:00 AM), https://slate.com/technology/2014/05/white-smith-music-case-a-terrible-1908-supreme-court-decision-on-player-pianos.html [https://perma.cc/G6S6-FX9J] (explaining that Congress overturned *White-Smith*'s holding that player piano roll printers did not need to pay royalties to songwriters by enacting the Copyright Act of 1909, which mandated compulsory licenses for songs to limit the royalties that could be demanded); FROMER & SPRIGMAN, *supra* note 26, at 368 (same); 17 U.S.C § 115 (compulsory license for nondramatic musical works).

54 *See* Raustiala & Sprigman, *supra* note 53; Victor, *supra* note 11, at 940.

55 Victor, *supra* note 11, at 941.

and distribute it.[56] Thus, while this access-increasing compulsory license was created in response to and in order to encourage technological innovation, it also created the legal pathway for the American cover-song tradition to thrive.[57]

Section 115 procedures provide a ceiling, so a potential licensee may negotiate their own license with the rightsholder below the set rate.[58] Historically, most licensees did not take advantage of the § 115 compulsory license and instead negotiated with an intermediary representing a large number of rightsholders called the Harry Fox Agency.[59] With the rise of digital streaming and the resulting exponential increase in royalty payments,[60] the traditional piecemeal compulsory licensing system for musical works could not keep up with scale—platforms and the Agency did not always know who to pay, resulting in artists not getting paid and platforms getting sued.[61] In 2018, Congress again responded to the clash between innovation and the existing copyright structure and passed the Music Modernization Act (MMA).[62] Instead of continuing with the previous song-by-song approach, Title

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56 *See* Passman, *supra* note 48, at 214–17 (explaining the conditions for a compulsory mechanical license); Fromer & Sprigman, *supra* note 26, at 366–67; 17 U.S.C § 115(a)–(c) (detailing the compulsory license carveout).

57 *See* Raustiala & Sprigman, *supra* note 53; Victor, *supra* note 11, at 940–43 (explaining the role that the mechanical license played in the development of the twentieth century American recording industry).

58 *See* Passman, *supra* note 48, at 216 (discussing the compulsory license as a backup to a potential voluntary license); 17 U.S.C § 115(c)(2)(A) (describing terms for voluntary licenses).

59 Fromer & Sprigman, *supra* note 26, at 367 (noting that the Harry Fox Agency administers licenses to affiliates with a "relatively streamlined payment and accounting process" and that these licenses are "often issued at a rate substantially *below* the statutory rate").

60 To illustrate: In 2014, Taylor Swift removed her entire catalog from Spotify and focused on selling albums rather than streams, even though Spotify at the time had more than forty million users. *See* Hannah Karp & Sven Grundberg, *Taylor Swift Pulls Her Music from Spotify*, Wall St. J. (Nov. 4, 2014, 12:25 AM), https://www.wsj.com/articles/spotify-says-taylor-swift-pulls-her-music-from-service-1415035751 [https://perma.cc/4NZH-F92P]. She later returned her full catalog to Spotify in 2017, when "streaming made up about 60% of total music consumption in the U.S." *See* Anne Steele, *Taylor Swift to Streaming Services: Look What You Made Me Do*, Wall St. J. (Aug. 23, 2019, 6:01 AM), https://www.wsj.com/articles/taylor-swift-to-streaming-services-look-what-you-made-me-do-11566554484 [https://perma.cc/2QK7-WT7L].

61 *See* Passman, *supra* note 48, at 239–40; *see, e.g.*, Erin M. Jacobson, *Spotify May Have To Pay Songwriters $345 Million*, Forbes (Jul. 19, 2017, 6:37 PM), https://www.forbes.com/sites/legalentertainment/2017/07/19/spotify-may-have-to-pay-songwriters-345-million/?sh=5ad1a40193d4 [https://perma.cc/TC4D-HT8R] (discussing a lawsuit against Spotify for failure to pay mechanical licenses to Bob Gaudio, former member of Frankie Valli and The Four Seasons).

62 Pub. L. No. 115-264, 132 Stat. 3676; Fromer & Sprigman, *supra* note 26, at 371 (providing an overview of the MMA); Passman, *supra* note 48, at 239–41 (same).

I of the MMA authorized the creation of the Mechanical Licensing Collective (MLC) to administer compulsory blanket licenses to digital music providers like Spotify.[63] Theoretically, as long as Spotify obtains a blanket license and pays the MLC for all of its users' streams, Spotify can stream any song without being guilty of infringing the musical composition.[64]

The MMA also changed the standard by which the Copyright Royalty Board (CRB)[65] sets the statutory rate for compulsory licenses.[66] Previously, the CRB's rate setting was informed by four public policy factors which often led to statutory rates lower than market benchmarks.[67] Today, the CRB has shifted from these policy guidelines and instead applies a "market-based willing buyer/willing seller" rate, which is expected to increase royalty rates and be friendlier to rightsholders.[68]

On the other hand, copyrights in sound recordings are not subject to § 115 and are much more limited than copyrights in musical compositions.[69] These rights over sound recordings are distinct from the rights over musical compositions regulated by Title I of the MMA.[70] Reproduction and distribution rights only protect against copying the "actual sounds fixed in the recording."[71] This means that covers of a recording do not infringe sound recording rights, while samples and remixes could potentially be infringing.[72] In general, public performance rights do not attach to sound recordings, though they do for digital

63 *See* Fromer & Sprigman, *supra* note 26, at 371–72; 17 U.S.C. § 115(d) (blanket license). The MLC is also directed to create a musical works database to promote accurate payment to copyright holders. Fromer & Sprigman, *supra* note 26, at 372; 17 U.S.C. § 115(d)(3)(E) (musical works database).

64 *See* Fromer & Sprigman, *supra* note 26, at 371–72 (explaining what digital music providers must do in order to avoid infringement); 17 U.S.C. § 115(d)(1)(D) (noting protection against infringement actions).

65 The Copyright Royalty Board was created to adjust the statutory rate for the § 115 compulsory license and is "composed of three administrative judges appointed by the Library of Congress." *See* Register of Copyrights, *supra* note 41, at 27.

66 *See* Victor, *supra* note 11, at 948 (tracking recent changes in the CRB's rate-setting policy following the MMA).

67 *See id.* at 944, 962.

68 Tang, *supra* note 17, at 796–97; *see also* Victor, *supra* note 11, at 962 (discussing increased royalty rates).

69 *See* Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. Rev. 2519, 2527 (2019) ("[T]he [MMA] blanket license only applies to musical works, not sound recordings. . . . [D]igital streaming services must still obtain authorization and pay royalties for the use of those sound recordings.").

70 *See id.*

71 Fromer & Sprigman, *supra* note 26, at 374 (quoting 17 U.S.C. § 114(b)).

72 Fromer & Sprigman, *supra* note 26, at 374.

streams.[73] Thus, The Band's cover of "Atlantic City" did not implicate Springsteen's right in the recording on *Nebraska*, but if an artist were to make a copy of the harmonica riff on *Nebraska* and mix it into a new recording, that could potentially constitute copyright infringement.

Congressional attention to music industry dynamics might be shown in the absence of sound recording public performance rights for terrestrial radio and the availability of a statutory license for some digital noninteractive streams.[74] Despite the lack of sound recording royalties, terrestrial radio was such a successful promotional tool during its heyday in the early twentieth century that stiff competition for airtime led record labels to resort to paying broadcasters under the table.[75] When internet radio stations arrived on the scene, Congress granted sound recording rightsholders a public performance right for digital interactive streams amid fears that digital music would replace tangible album sales.[76] The limited public performance rights for sound recordings reflect compromises made by lawmakers between access-promoting technologies and rightsholders, which will be discussed further in Part III.[77]

In sum, playing a song requires the ability to navigate the complicated web of music licensing. As discussed in the next subsection, users who require sync licenses must manage these high transaction costs without the aid of intermediaries or compulsory licenses.

2. Synchronization Rights

The Copyright Act does not explicitly grant synchronization rights, but they are generally accepted as aspects of the author's right to use sound recordings and musical compositions to create reproductions and

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[73] *See id.*; 17 U.S.C. § 106(4) (public performance); 17 U.S.C. § 106(6) (digital audio transmission).

[74] *See* Fromer & Sprigman, *supra* note 26, at 374; 17 U.S.C. § 114(d)(1)(A)–(B), (2).

[75] *See* Gary Myers & George Howard, *The Future of Music: Reconfiguring Public Performance Rights*, 17 J. Intell. Prop. L. 207, 210–12 (2010) (noting that musicians consented to play music on the radio for free because it was promotion that led to more attendance at live events); Lauren E. Kilgore, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 Vand. J. Ent. & Tech. L. 549, 560 (2010) (explaining that radio was "essentially advertising new music to listeners").

[76] *See* Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 Hous. L. Rev. 537, 570–72 (2014) ("The fear that digital music services would cannibalize sales of CDs strongly shaped the scope of the public performance right granted to sound recording copyright owners.").

[77] *See id.* at 577–78 (arguing that the evolution of the scope of protection for the sound recording digital public performance copyright was justified by a need to protect existing revenue streams and limit threats to incumbents by new technologies).

derivative works.[78] A synchronization (sync) license grants permission to use or reproduce a song in "timed-relation" to an "audiovisual work," typically in movies, TV shows, or commercials.[79] The exact meaning of "timed-relation" is unclear.[80] Some take a broad view in which timed-relation merely refers to audio and video played together,[81] while a stricter reading of timed-relation requires intent to line up the visual images with the accompanying music.[82] Under either definition, it seems likely that at least some, if not most, user-generated content (UGC) on platforms such as TikTok would implicate sync rights. This is because much of the content on TikTok involves users dancing or lip syncing to an audio track, which requires coordinating movements to music.[83]

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[78] Register of Copyrights, *supra* note 41, at 55–56; Theodore Z. Wyman, Annotation, *Enforceability of Synchronization Rights and Licenses in Copyrighted Music*, 84 A.L.R. Fed. 2d 345 Art. 1 § 2 (2014); Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 527 (9th Cir. 2008) ("Though it is not explicit in the Copyright Act, courts have recognized a copyright holder's right to control the synchronization of musical compositions with the content of audiovisual works and have required parties to obtain synchronization licenses from copyright holders."); *see* Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 920 (2d Cir. 1984) ("The 'synch' right is a form of the reproduction right also created by statute as one of the exclusive rights enjoyed by the copyright owner."); Agee v. Paramount Commc'ns, Inc., 59 F.3d 317, 322 (2d Cir. 1995) ("A synchronization of previously recorded sounds onto the soundtrack of an audiovisual work is simply an example of the reproduction right explicitly granted by section 114(b) to the owner of rights in a sound recording."); 17 U.S.C. §§ 106(1), 114(b).

[79] 6 Nimmer on Copyright § 30.02[F][3] (2023); Goodyear, *supra* note 8, at 123–25; Passman, *supra* note 48, at 242. As defined by the Copyright Act, "audiovisual works" are "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices . . . together with accompanying sounds . . . regardless of the nature of the material objects . . . in which the works are embodied." 17 U.S.C. § 101. For the purposes of this Note, the analysis proceeds by assuming licenses are required to sync both the musical composition and a specific musical recording because many viral TikTok trends are driven by using specific recordings. *See infra* Section I.C.

[80] *See* Goodyear, *supra* note 8, at 133.

[81] *See* Freeplay Music, Inc. v. Cox Radio, Inc., 404 F. Supp. 2d 548, 552 n.2 (S.D.N.Y. 2005) (explaining that "reproduction by another need not be synchronized with visual images to constitute an infringement"); Hannah Skopicki, Comment, *Pixelated Poltergeists: Synchronization Rights and the Audiovisual Nature of "Dead Celebrity" Holograms*, 70 Am. U.L. Rev. F. 1, 16 n.92 (2020) (defining timed-relation to be "sound recordings and audiovisual components presented to an audience or viewer concurrently and in unison"); Goodyear, *supra* note 8, at 133–34 (discussing the two possible definitions for timed-relation).

[82] This is advocated for in Goodyear, *supra* note 8, at 133–34 (arguing that a reading of timed-relation which does not require intentional coordination of audio and images would run up against the rule against surplusage concerning the definition in the Copyright Act of audiovisual works).

[83] It is generally not the intent of creators of this kind of content to be out of sync with the music. Imagine a dance video in which the performer is dancing off-beat, or a lip sync video in which the performer's "singing" doesn't match up with the lyrics of the song. This would likely be jarring, though perhaps humorous in some instances. It does not appear that any court has squarely addressed applicability of sync rights in this context yet. *See infra* Section II.A.2. Video games and karaoke are perhaps the most related innovative technologies to which courts have held sync rights to be applicable. *See* Goodyear, *supra*

Sync licenses are negotiated in the free market by sophisticated parties at film and television production companies, labels, and publishers.[84] Notably, unlike some other types of music licenses, sync licenses are noncompulsory, and the rightsholder may deny permission for a particular use for any reason.[85] Licensing rates may vary greatly depending on the nature of the use, the length and number of times the song will be used, the popularity of the song, and the budget of the licensee.[86] And because musical compositions and sound recordings each have separate copyrights,[87] anyone seeking a sync license will likely need to obtain licenses from multiple copyright owners.[88] It may be difficult to accurately identify, locate, and obtain a license from all rights-holding songwriters and performers that contributed to a song, especially if artists are unsigned.[89]

There are also no dominant collective rights organizations like PROs to reduce these high transaction costs, although there are now some smaller sync clearinghouse platforms like Songtradr where artists can directly upload their music to a database for licensing by content producers, circumventing the labels and publishers.[90] This individualized

note 8, at 120–23 (discussing the expansion of sync rights to include video games and courts' differing opinions as to karaoke); Romantics v. Activision Publ'g, Inc., 574 F. Supp. 2d 758, 762, 767–68 (E.D. Mich. 2008) (expanding the scope of sync rights to include video games); ABCKO Music, Inc. v. Stellar Recs., Inc., 96 F.3d 60, 65–66 (2d Cir. 1996) (holding that use of a video image with lyrics, together with music, requires a sync license); Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 528–29 (9th Cir. 2008) (holding that a sync license is required because projected karaoke lyrics must match up with the music). *But see* EMI Ent. World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1221–24 (D. Utah 2007) (holding that sync rights are not required because the digital copy of the lyrics, without more, was a literary rather than an audiovisual work).

84 *See* Skopicki, *supra* note 81, at 13 (listing the parties); Register of Copyrights, *supra* note 41, at 56 (discussing the sync market).

85 *See* Goodyear, *supra* note 8, at 116.

86 *See* Passman, *supra* note 48, at 242–50 (explaining that rates for sync licenses vary greatly depending on how the song is used, how long it is to be used for, the importance of the song, and other factors); *How to Acquire Music for Films*, ASCAP, https://www.ascap.com/help/career-development/How-To-Acquire-Music-For-Films [https://perma.cc/SQA5-59SV] (describing the variable nature of sync license fees and noting that rates are negotiable).

87 *See supra* Section I.A.

88 Goodyear, *supra* note 8, at 114.

89 *See* Goodyear, *supra* note 8, at 116 (noting the potential difficulty of identifying the owner of a sync right due to the general lack of "clearinghouses" or collective rights organizations for sync licenses). The MLC database was established in part to fill this kind of data gap. *See* Passman, *supra* note 48 at 239–41; Duncan Cooper, *How TikTok Gets Rich While Paying Artists Pennies*, Pitchfork (Feb. 12, 2019), https://pitchfork.com/features/article/the-great-music-meme-scam-how-tiktok-gets-rich-while-paying-artists-pennies [https://perma.cc/W9Z3-BTY3] (noting one study finding that contemporary hits "typically have four writers and six publishers").

90 *See id.* at 116; Paul Resnikoff, *What Is Sync Licensing? A Look at the Music Industry's Fastest-Growing Sector*, Digit. Music News (Jan. 30, 2020), https://www.digitalmusicnews.

negotiation framework means that sync licensing "generates significant transaction costs, especially for smaller content creators," like many of the users on TikTok.[91] While the transaction-cost issue has always existed, the rapid life cycle of trends on TikTok and other platforms means that content creators—or TikTok itself—need to negotiate licenses more quickly than in traditional industries like film and television.[92]

Generally, sync rights have been overlooked by courts and academia,[93] and in 2022, sync licensing generated only 2.41% of total revenue for the music industry.[94] But sync licensing is certainly a growth area due to the proliferation of video content in fitness, video gaming, and on video streaming and social media platforms.[95] In 2022, Kate Bush's 1985 release "Running Up That Hill (A Deal With God)" was used in the hit TV show Stranger Things and had a viral moment on TikTok—the #runningupthathill hashtag had nearly a billion views, and the song was used in over two million videos.[96] Syncs that garner such large social media attention can generate both licensing revenue and

com/2020/01/30/what-is-sync-licensing [https://perma.cc/PC8X-LDQB]. Since it began in 2014, Songtradr has made significant efforts to become a bigger player in business-to-business licensing and has acquired other similar companies, including 7digital, Tunefind, and Pretzl. *See* Murray Stassen, *Songtradr to Acquire 7digital, a UK Publicly Listed B2B Music Technology Company, in $23.4m Deal*, Music Bus. Worldwide (Feb. 8, 2023), https://www.musicbusinessworldwide.com/songtradr-to-acquire-7digital-a-uk-publicly-listed-b2b-music-technology-company-in-23-4m-deal [https://perma.cc/2VKR-DS6G].

91 Goodyear, *supra* note 8, at 127; *see* Sekou Campbell, *Peloton Suit Shows Sync Licensing Is Next Copyright Horizon*, Law360 (Feb. 19, 2020, 1:35 PM), https://www.law360.com/articles/1244986/peloton-suit-shows-sync-licensing-is-next-copyright-horizon [https://perma.cc/CYX3-TKWS] (explaining that the time and expense required to manage the sync licensing gap imposes significant costs, even on larger companies like Peloton).

92 *See* Goodyear, *supra* note 8, at 127 (arguing that the "short lead time and limited time use" conditions in sync licenses pose additional hurdles for online streaming).

93 Goodyear, *supra* note 8, at 117–18. This may be because it is likely that, in most cases, if a user does not have a sync license, they probably also do not have other licenses such as a license for reproduction or public performance. Copyright infringement litigation can then proceed over one of these more obvious licenses. For notable exceptions, see Goodyear, *supra* note 6, DeLisa, *supra* note 20, and Skopicki, *supra* note 81.

94 Recording Indust. of Am., RIAA Revenue Statistics 3 (2022), https://www.riaa.com/wp-content/uploads/2023/03/2022-Year-End-Music-Industry-Revenue-Report.pdf [https://perma.cc/7W3U-462L] (documenting that in 2022 synchronization royalties brought in $382.5 million out of a total $15,873.9 million in estimated retail dollar value).

95 *See* Dylan Smith, *Sync Licensing Is Evolving—Now There's a Comprehensive Analysis of the Music Industry's Most Exciting Segment*, Digit. Music News (Jul. 19, 2022), https://www.digitalmusicnews.com/2022/07/19/sync-licensing-report-2022 [https://perma.cc/LDZ9-YTSN] (analyzing data, expert statements, and predictions to chart sync's total addressable market); Recording Indus. of Am., *supra* note 94 (reporting that synchronization royalties grew 24.8% in 2022).

96 Eamonn Forde, *That Syncing Feeling: How Stranger Things Supercharged the Music Industry*, Guardian (Jul. 12, 2022, 5:39 AM), https://www.theguardian.com/music/2022/jul/12/that-syncing-feeling-how-stranger-things-supercharged-the-music-industry [https://perma.cc/D4BT-FLSC].

provide a "promotional springboard" for labels, publishers, and artists, leading to a surge in popularity.[97]

This same digital platform innovation might also lead to more sync-focused litigation.[98] The fitness company Peloton is another example of innovative technology with needs that are different from the traditional industries that require sync licenses.[99] In 2019, members of the National Music Publishers Association sued Peloton for failing to license songs synced to its popular workout videos.[100] Live workout classes generally rely on PROs to obtain public performance licenses, giving instructors freedom to create playlists without much lead time.[101] But Peloton's workout videos required additional sync licenses associated with the high transaction costs discussed above, and Peloton argued that instructors often did not give Peloton sufficient notice in order to ensure it had obtained the necessary licenses.[102] Thus, despite the relative obscurity of sync rights, innovation appears to have brought them into the spotlight, raising new legal questions about how emerging technology platforms should acquire sync licenses.

C. TikTok and the Music Industry

In 2020, during the COVID-19 pandemic, TikTok became one of the most popular ways to pass the time and a cultural lifeline for many.[103] But unlike the majority of TikTok trends that are in and out in weeks,[104] TikTok as a platform continues to thrive as of this writing.[105]

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97 *Id.*

98 *See* Campbell, *supra* note 91.

99 *See id.*

100 Dani Deahl, *Peloton Is Being Sued for Using Music Without Permission in its Video Fitness Classes*, VERGE (Mar. 19, 2019, 3:31 PM), https://www.theverge.com/2019/3/19/18273063/peloton-music-lawsuit-licensing-video-fitness-classes-nmpa [https://perma.cc/Q6XY-X968].

101 *See* Campbell, *supra* note 91 (explaining how, unlike TV, film, and commercial producers, Peloton sometimes only has a matter of hours to obtain sync rights to each song used by its instructors).

102 Downtown Music Publ'g LLC v. Peloton Interactive, Inc., 436 F. Supp. 3d 754, 760 (S.D.N.Y. 2020); Goodyear, *supra* note 8, at 127.

103 *See* Sirin Kale, *How Coronavirus Helped TikTok Find Its Voice*, GUARDIAN (Apr. 26, 2020, 3:00 AM), https://www.theguardian.com/technology/2020/apr/26/how-coronavirus-helped-tiktok-find-its-voice [https://perma.cc/EN46-H4K9].

104 *See* Shivani Dubey, *Are We Saying Goodbye to Viral Trends?*, HUFFPOST (Feb. 21, 2023, 4:11 PM), https://www.huffingtonpost.co.uk/entry/are-we-saying-goodbye-to-viral-trends_uk_63f4eb01e4b0a1ee14962ba9# [https://perma.cc/6XNU-VDN7] (noting that contemporary viral trends often last less than two weeks due to the influence of algorithms and app curation).

105 *See* Alejandra O'Connell-Domenech, *TikTok's Popularity Among Americans Growing Faster than Any Other Platform: Pew*, HILL (Jan. 31, 2024), https://thehill.com/changing-america/well-being/mental-health/4440620-tiktok-popularity-among-americans-growing-fastest-pew [https://perma.cc/F7JP-TLDY] (citing a Pew Reseach Study that concluded that

TikTok currently has over 1.1 billion monthly active users and was the most downloaded app in the world until it was surpassed by Instagram in 2023.[106] TikTok combines an algorithm with creative tools to make and share short videos, resulting in an endless feed of UGC.[107] As discussed further below, the rapid rise of TikTok has also created profound changes in the music industry because of its complementary role.

TikTok's content creator tools also encourage user engagement: Not only is it easy to make a video with many customizable options, but hashtags, "stitching," and "duet" features encourage users to interact with and build upon other users' content.[108] TikTok also allows users to add music to their videos—choreographed dances, lip sync videos, mashups, concert streams, and reaction videos frequently go viral.[109]

"the number of TikTok users in the U.S. is growing rapidly, with the site claiming the largest jump in users between 2021 [and] 2023 compared to any other social media platform"). It is important to note that at the time of this writing, congressional lawmakers introduced a bill to force the Chinese company ByteDance, TikTok's owner, to sell the app or face a possible ban in the United States because of national security issues. *See* Sapna Maheshwari & David McCabe, *TikTok Prompts Users to Call Congress to Fight Possible Ban*, N.Y. Times (Mar. 7, 2024), https://www.nytimes.com/2024/03/07/business/tiktok-phone-calls-congress.html [https://perma.cc/V66C-B9P7]. However, this Note's argument rests on TikTok's significant contribution to video content and creativity that has opened the door for future innovation. Even if TikTok becomes a thing of the past, another audio and video app would likely rise to take its place.

106 Dan Milmo, *Instagram Overtakes TikTok as World's Most Downloaded App*, Guardian (Mar. 8, 2024, 11:44 AM), https://www.theguardian.com/technology/2024/mar/08/instagram-tiktok-app-reels-video-meta [https://perma.cc/M9GU-MTS2].

107 *See* J.D. Biersdorfer, *The Latecomer's Guide to TikTok*, N.Y. Times (Oct. 26, 2022), https://www.nytimes.com/2022/10/26/technology/personaltech/tiktok-guide-latecomers.html [https://perma.cc/5VHD-QDYF] (explaining the basic tools for making a TikTok video and noting that TikTok's algorithm makes it easy to consume videos).

108 *See* 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/8YYY-7QBM] (explaining that hashtags act as an "organizing principle" for repeated and modified activity, and that "duets" allow users to duplicate videos and then add a video to play simultaneously with the original); *Stitch*, TikTok, https://support.tiktok.com/en/using-tiktok/creating-videos/stitch# [https://perma.cc/2DKD-5M5B] (explaining that "stitch" is a creation tool that allows a user to add their own video to play sequentially with another video on TikTok).

109 *See* Margaret Fuhrer, *TikTok Is Dead (Maybe). Long Live TikTok Dance.*, N.Y. Times (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/arts/dance/tiktok-dance-evolution.html [https://perma.cc/9M3B-R8V3] (discussing the evolution of dance culture on TikTok, which has been nicknamed "the dance app" due to the dance trends that frequently go viral); Amanda Perelli, *The Top Breakout TikTok Stars of Each Year Since 2019 Show How the App Has Evolved over Time*, Bus. Insider (Mar. 14, 2023), https://www.businessinsider.com/top-creators-on-tiktok-through-the-years-rising-stars-list-2023-3 [https://perma.cc/B493-W2QX] (noting that TikTok stars have become famous for dance and lip sync videos); Chase DiBenedetto & Elena Cavender, *You're Not Getting Old, Concerts Are Weird Now*, Mashable (Jan. 27, 2023), https://mashable.com/article/concert-culture-tiktok-matty-healy-harry-styles [https://perma.cc/8ZAL-XZFH] (noting that "nothing is more valuable on TikTok than a viral concert clip").

Such videos typically implicate sync rights because a song is being used in timed-relation to an audiovisual work—the effectiveness of the video depends on the visuals lining up with the music.[110]

Because it is relevant to the applicability of fair use discussed in Section II.A.1, it is important to note that TikTok's popularity and features have also made it an attractive place for brands.[111] Recognizing the contemporary appeal of video, especially for younger audiences, some brands have shifted marketing dollars to run paid ads on TikTok and to hire content creators and influencers to promote their brands and products.[112] Creators on TikTok can directly monetize their posts by sharing affiliate links, selling their own products in the app, developing a subscription service or paywalled content, or landing lucrative brand sponsorships.[113] Influencers or even ordinary users might post personal content that is not explicitly commercial which has indirect financial benefit or from which the user "profits."[114] Influencer success depends on consistently posting successful content to attract followers,[115] and it

110 *See supra* notes 78–82 and accompanying text.

111 *See* Sapna Maheshwari, *Wanted: Interns Who Can Make TikTok Hits*, N.Y. Times (Feb. 23, 2023), https://www.nytimes.com/2023/02/12/business/tiktok-interns.html [https://perma.cc/Z2BE-JNBE] (discussing brands who have hired younger content creators to expand the brands' presence and engagement on TikTok).

112 *See* Julian Canon, *Marketers to Focus on Gen Z in 2023 with Dollars Moving to TikTok, Raw Approach to Creative*, Digiday (Jan. 3, 2023), https://digiday.com/marketing/marketers-to-focus-on-gen-z-in-2023-with-dollars-moving-to-tiktok-raw-approach-to-creative [https://perma.cc/W83B-T3FZ] (discussing some brands' shift of social media marketing dollars towards TikTok in an effort to reach younger audiences); Richard Kestenbaum, *How Brands' Social Media Marketing Is Evolving*, Forbes (Mar. 1, 2023, 8:10 AM), https://www.forbes.com/sites/richardkestenbaum/2023/03/01/how-brands-social-media-marketing-is-evolving/?sh=2be0a8e702b1 [https://perma.cc/68HU-YVXK] (noting that short-form video campaigns often have higher engagement rates and are more likely to appeal to younger consumers). Influencers are "people who have built a reputation for their knowledge and expertise on a specific topic," and may appeal to a niche or generalist audience. Werner Geyser, *What is an Influencer? – Social Media Influencers Defined [Updated 2024]*, Influencer Mktg. Hub (Nov. 15, 2023), https://influencermarketinghub.com/what-is-an-influencer [https://perma.cc/NV4J-YWCN].

113 *See* Rebecca Jennings, *You Go Viral Overnight. Now How Do You Get Rich?*, Vox (Jan. 25, 2022, 9:00 AM), https://www.vox.com/the-goods/22899585/influencer-rate-calculator-pay-gap-brand-deals-sponsorships [https://perma.cc/4QBS-B977]; Mia Sato, *TikTok Introduces Paywalled Content, with Videos up to 20 Minutes Long*, Verge (Mar. 7, 2023, 9:00 AM), https://www.theverge.com/2023/3/7/23628202/tiktok-paywalled-content-series-monetization-longer-videos [https://perma.cc/92UM-9TGL] (explaining TikTok has introduced a feature that will allow creators to put exclusive content behind a paywall).

114 *See infra* Section II.A.1.

115 *See* Taylor Lorenz, *Young Creators Are Burning Out and Breaking Down*, N.Y. Times (Sept. 17, 2021), https://www.nytimes.com/2021/06/08/style/creator-burnout-social-media.html [https://perma.cc/JDX2-WZA5] (discussing content creators who struggle with burnout because of pressure to regularly produce popular content).

is unlikely that users who value authenticity will stick with an influencer who only posts sponsored content.[116]

The variety of ways to profit from content creation can make it difficult to classify whether a particular video is commercial or not.[117] Creators must meet minimum follower and view counts to access the app-supported Creativity Program, so some strive to make popular content to access this financial benefit.[118] Viral success on TikTok can be strategic or a complete accident, and can lead to television shows,[119] agency representation,[120] and record deals.[121] Some influencers have full-fledged offline careers[122] and use their social media presence to build their personal brand, in addition to the occasional ad. For example, celebrity chef Sophia Roe is a James Beard Award-winning chef and Emmy-nominated TV host, and she has over 138 thousand followers on

116 *See* Alexandra J. Roberts, *False Influencing*, 109 Geo. L.J. 81, 84–85 (2020) (noting that "[a]uthenticity lies at the core of the advertising model," such that "influencers strive to be authentic, consumers cite authenticity as driving their engagement with influencer content, and companies partner with influencers to link their products with trusted sources" because "disguising the commercial nature of the speech and presenting the endorsement as organic increases its effectiveness"); *see generally* Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 Buff. L. Rev. 721, 748 (2010) ("The appearance of voluntariness makes consumer speech more persuasive than the advertiser's own obviously self-interested speech. Studies of Internet use in particular replicate this result.").

117 *See* Isaiah Poritz, *TikTok Music Lawsuits Fire Warning Shots to Brands, Influencers*, Bloomberg L. (Dec. 6, 2022, 5:10 AM), https://news.bloomberglaw.com/ip-law/tiktok-music-lawsuits-fire-warning-shots-to-brands-influencers [https://perma.cc/2ULY-QAZP].

118 *See* Caitlin O'Kane, *TikTok Is Ending Its Creator Fund, Which Paid Users for Making Content*, CBS News (Nov. 7, 2023), https://www.cbsnews.com/news/tiktok-creator-fund-1-billion-paid-users-making-content-creativity-program [https://perma.cc/RLY9-WTWX] (explaining that in the new Creativity Program (beta) U.S. creators are eligible for the program if they have "at least 10,000 followers and at least 100,000 views in the last 30 days," but noting that previous versions of the program were criticized for paying creators too little).

119 *See, e.g.*, Jon Caraminca, *TikTok Made Them Famous. Figuring Out What's Next Is Tough.*, N.Y. Times (Dec. 27, 2021), https://www.nytimes.com/2021/12/23/arts/music/tiktok-stars-tv-film-music.html [https://perma.cc/V48C-W4SL] (noting that TikTok stars Charli and Dixie D'Amelio partnered with Hulu to create a docuseries about their TikTok success and lifestyle).

120 *See, e.g.*, Alexandra Jacobs, *Your Annoying Roommate Is Slaying on TikTok*, N.Y. Times (Mar. 15, 2022), https://www.nytimes.com/2023/03/14/style/sabrina-brier-tiktok.html [https://perma.cc/CHM4-UVHZ] (noting that influencer Sabrina Brier's TikTok popularity has led to representation by top firm Creative Artists Agency).

121 Adela Suliman, Kelly Cobiella & Kiko Itasaka, *TikTok Star Behind 'Wellerman' Sea Shanty Craze Quits Job as Mailman*, NBC News (Jan. 24, 2021, 11:03 AM), https://www.nbcnews.com/news/world/tiktok-star-behind-wellerman-sea-shanty-craze-quits-job-mailman-n1255426 [https://perma.cc/FB3T-5JVZ] (discussing a postman who signed a deal with Polydor Records after going viral on TikTok for singing sea shanties).

122 *About*, I Am Sophia Roe, https://www.iamsophiaroe.com/about-sophia-roe [https://perma.cc/MA6D-L8VT]; Sophia Roe (@sophia_roe), TikTok, https://www.tiktok.com/@sophia_roe [https://perma.cc/24YN-VG3J].

TikTok. Her posts range from day-in-the life videos, paid sponsorships, cooking tips, and recipe testing to candid personal opinions.[123] When Sophia Roe posts a recipe demonstration on TikTok, her purpose might be to build her reputation as a chef, increase interest in a cookbook she might someday publish, share the joy of cooking, or all of the above. These potential varying direct and indirect monetization strategies suggest that whether content is personal or commercial is more like a spectrum, rather than a clearly defined dichotomy.

By making it free and easy to sync music to UGC, TikTok has created a new licensing revenue stream that incumbent rightsholders reasonably seek to control.[124] In response to allegations of infringement, TikTok entered into blanket licensing agreements with all major labels and publishers.[125] While the agreements remedy the transaction costs identified in Section I.B.2 for those songs, users can still infringe copyrights by uploading a song or portion of a song that has not been licensed for use on TikTok through a third-party app,[126] and there is some evidence that infringement still occurs on TikTok.[127] Additionally, TikTok requires businesses and creators who post "branded content or content for their own commercial purposes" to individually obtain proper licensing or select from a much more limited Commercial Music Library, which includes songs by artists contracted to SoundOn—TikTok's in-house distribution program for independent artists.[128]

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123 *See generally* Sophia Roe (@sophia_roe), *supra* note 122.

124 *See* Mike Masnik, *Don Henley Tells Senators: We Must Change Copyright Law . . . Because The People Like TikTok?*, TECHDIRT (June 8, 2020, 9:39AM), https://www.techdirt.com/2020/06/08/don-henley-tells-senators-we-must-change-copyright-law-because-people-like-tiktok [https://perma.cc/FZ45-2NAD] (discussing successful recording artist Don Henley's testimony before the Senate Judiciary Committee's IP Subcommittee, in which he criticized TikTok and other social media platforms for being vehicles of "rampant infringement"); *cf.* Loren, *supra* note 76, at 582 (comparing dual narratives explaining the accretion of rights in music copyright as both "a way to ensure an adequate revenue stream for copyright owners as technologies change and business models shift" and "as protecting incumbent businesses from the full-throttle competition of the digital age").

125 *See* Stutz, *supra* note 14; *see generally supra* note 14 and accompanying text.

126 *See, e.g.*, Jane Zhou, *How to Upload Your Own Sound to TikTok in 2023*, EASEUS (Nov. 16, 2023), https://multimedia.easeus.com/video-editing-tips/upload-your-sound-to-tiktok.html#part2 [https://perma.cc/855Q-7J9Z]; Evan Gower, *How to Edit Sound For a TikTok Video*, ALPHR (Feb. 8, 2023), https://www.alphr.com/edit-sound-tiktok-video [https://perma.cc/WE5K-V5Y2].

127 Globally, from January 1, 2023, to June 30, 2023, TikTok received 189,564 copyright takedown requests, of which 113,491 were successful. *Intellectual Property Removal Requests Report*, TIKTOK (Nov. 10, 2023), https://www.tiktok.com/transparency/en-us/intellectual-property-removal-requests-2023-1 [https://perma.cc/4ZPF-J9M8].

128 *Commercial Music Library*, TIKTOK BUS. HELP CTR., https://ads.tiktok.com/help/article/commercial-music-library?lang=en [https://perma.cc/2AQH-DPPW]; Stuart Dredge, *TikTok Music Boss Talks Short Video, Long-Form Listening and Licensing*, MUSIC ALLY (Jan. 17, 2023), https://musically.com/2023/01/17/tiktok-music-short-video-listening-licensing [https://

While some brands and content professionals may have the resources to secure additional licenses if desired, many likely do not have the means, and must either choose a different or less desirable song from the Commercial Music Library, or engage in infringement.[129]

In addition to launching indie artists to stardom and reigniting the flame of popular back-catalog tracks,[130] TikTok has taken several steps to further integrate itself with the music industry. TikTok launched the SoundOn music distribution platform,[131] partnered with Ticketmaster to allow users to purchase concert tickets on TikTok,[132] offered a highly successful streamed live concert experience,[133] and teased the release of a subscription streaming service called TikTok Music that appears to be a similar model to Spotify and Apple Music.[134]

Despite these encroaching advances, TikTok appears to be more of a complement to music industry incumbents than a rival.[135] Abundant

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perma.cc/C3XM-BSBB] (discussing the marketing and promotional benefits of releasing a track on TikTok's in-house distribution program, SoundOn); *cf. Helping Brands Unlock the Power of Music and Sound on TikTok*, TikTok (Oct. 7, 2021), https://newsroom.tiktok.com/en-us/helping-brands-unlock-the-power-of-music-and-sound-on-tiktok [https://perma.cc/YX5T-P83V] (announcing a new set of partnerships and encouraging brands and businesses to take advantage of the licensed sounds offered by TikTok).

129 *See, e.g.*, Poritz, *supra* note 117 (noting copyright lawsuits filed on behalf of rightsholders against Bang energy drink maker and makeup brand Iconic London alleging unlicensed social media posts).

130 *See* Ingham, *supra* note 5 (describing how the "streaming-era boom in cheap music production tools and marketplaces" like TikTok have allowed independent artists to experience great success); Elsa Cavazos, *Best TikTok Songs of 2020*, Teen Vogue (Dec. 4, 2020), https://www.teenvogue.com/story/best-tik-tok-songs-of-2020 [https://perma.cc/83WH-2FJ9] (noting that 1970s band Fleetwood Mac's song "Dreams" went viral on TikTok thanks to one user's skateboarding video).

131 *See* Lars Brandle, *TikTok's SoundOn Launches in Australia*, Billboard (Feb. 8, 2023), https://www.billboard.com/pro/tiktok-soundon-launch-australia [https://perma.cc/K7JQ-TKQT].

132 *See* Elena Cavender, *Ticketmaster and TikTok Team Up to Sell Tickets on Your FYP*, Mashable (Aug. 3, 2022), https://mashable.com/article/ticketmaster-tiktok-concert-tickets-partnership [https://perma.cc/25SS-YTFP].

133 *See* Murray Stassen, *TikTok's First Ever Live Concert Was Watched by over 33.5M Unique Viewers*, Music Bus. Worldwide (Dec. 19, 2023), https://www.musicbusinessworldwide.com/tiktoks-first-ever-live-concert-was-watched-by-over-33-5m-unique-viewers1 [https://perma.cc/7ZVK-FMKM] (noting that the live concert "TikTok In The Mix," which was streamed on TikTok, "attracted over 33.5 million viewers across the original broadcast and subsequent three rebroadcasts").

134 *See* Becky Buckle, *TikTok Teases New Music Streaming Platform TikTok Music*, Mixmag (Oct. 17, 2022), https://mixmag.net/read/tiktok-launching-new-music-streaming-app-tech [https://perma.cc/L7UM-L7TY]; Christianna Silva, *Spotify Has a Challenger on the Horizon: TikTok Music*, Mashable (Aug. 1, 2022), https://mashable.com/article/tiktok-music-spotify-challenger [https://perma.cc/339Q-8PSW].

135 TikTok recently launched two new features that appear capable of directly promoting musicians' revenue outside of TikTok: The "Add to Music App" feature, which allows users to save a song featured in a TikTok video to a playlist on their music streaming app of choice,

free content enabled by "digital disruption" can serve as "a powerful advertising service that allows some performers to build reputations and access these alternative [noncopyable] revenue sources."[136] TikTok stars often go on to sign record deals with major labels, and when a signed artist's songs go viral, it usually correlates with increased streams and concert ticket and album sales.[137] Fan-made concert videos of meme-worthy moments by performers can also go viral, potentially leading to more demand for unique concert experiences and the chance to get a personal video of the meme.[138]

For example, a clip of Spanish pop star Rosalía chewing gum onstage while performing her song "Bizcochito" became a meme and went viral on TikTok.[139] The meme sparked a "Rosalía Challenge" on TikTok where UGC mimicking Rosalía's gum chewing generated more viral videos,[140] and one observer noted that fans at concerts on that tour fans were "pulling out their phones specifically when 'Bizcochito' began."[141] TikTok users have also learned the dance moves that come

such as Spotify or Apple Music; and the "Artist Account" service, which seeks to "boost discoverability" and connect fans to artists. Dylan Smith, *TikTok Debuts 'Add to Music App' Feature, Enabling Users to Save Tracks to Spotify, Apple Music, and Amazon Music Playlists*, Digit. Music News (Nov. 14, 2023), https://www.digitalmusicnews.com/2023/11/14/tiktok-add-to-music-app-feature [https://perma.cc/54R3-LR5E]; Ashley King, *TikTok Introduces Artist Accounts to 'Boost Discoverability' on the Platform*, Digit. Music News (Nov. 30, 2023), https://www.digitalmusicnews.com/2023/11/30/tiktok-introduces-artist-accounts-to-boost-discoverability [https://perma.cc/UB9N-BJHC].

136 *See* Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. Rev. 1555, 1582 (2019) (arguing that "the abundant free content enabled by the first digital disruption destroyed one business model but ushered in many others").

137 *See* Sadiba Hasan, *Pop Stars Are Mugging for TikTok. Fans Are Loving It*, N.Y. Times (Nov. 15, 2022), https://www.nytimes.com/2022/11/15/style/tiktok-memes-pop-stars.html [https://perma.cc/2FEU-YWXU] ("26 percent of consumers ages 20 to 24 say they have attended a live music concert or bought merchandise from artists they have discovered through viral trends."); Whateley, *supra* note 7 (describing the impact going viral on TikTok has on streaming and radio popularity); Elias Leight, *Are Major Labels Cooling on Viral Artists?* Billboard (May 31, 2023), https://www.billboard.com/pro/major-label-viral-artist-signings-tiktok-cooling-off [https://perma.cc/C67E-D687] (noting that though music companies were "starting to look more carefully at viral phenomena" in 2023, "the mainstream music industry appeared fixated on signing acts with viral momentum" for "several years").

138 *See* DiBenedetto & Cavender, *supra* note 109 (noting that fans compete for tickets and interactions with their favorite artists from TikTok); *cf.* Kal Raustiala & Christopher Sprigman, The Knockoff Economy 222–23 (2012) (advocating for a business model shift in the music industry away from dependence on copy-prone recording sales to the difficult to replicate live concert experience).

139 Ashley Gale, *Rosalía Chewing Gum Video-Turned-Meme Has the Internet in Stitches*, Newsweek (Jul. 19, 2022, 6:12 PM), https://www.newsweek.com/rosali-chewing-gum-video-turned-meme-has-internet-stitches-1726137 [https://perma.cc/N5DD-D5GH].

140 Mateus, *Rosalía Chewing Gum*, Know Your Meme, https://knowyourmeme.com/memes/rosalia-chewing-gum [https://perma.cc/LPK2-XYSA].

141 *See* Hasan, *supra* note 137.

after the gum-chewing and uploaded videos of themselves performing the dance.[142] It might not be possible to attribute sold out concerts to viral memes directly, but they are certainly free promotion. These viral videos act like trailers for the tour—they are digestible clips that gain mass exposure.[143]

Because of technological advancement that has made music and video accessible to anyone with a smartphone, TikTok has become a go-to resource for music, expression, and culture, forging a dynamic and important relationship with the music industry and making sync rights relevant to more users than ever before. TikTok has also remedied many of the transaction costs associated with sync licensing by entering into private contracts with rightsholders. However, as discussed in Part II, there are other considerations which raise questions about the desirability of the current private licensing regime and its ability to account for copyright's access versus incentives tradeoff.

II
Private Sync Licenses for User-Generated Content Interfere with Copyright Policy

Part I explained how sync rights, a relatively unregulated piece of the music copyright structure, have risen to new prominence through the emergence of TikTok as a key method of cultural communication. As Professor Jessica Litman has commented, "[h]istory teaches that whenever we have discovered or enacted a copyright exception, an industry has grown up within its shelter."[144] Litman cautions that a "narrow focus on threats to copyright owners' control of their works can lose sight of the potential value . . . of a digital network."[145] Such communication networks "can both encourage creation and dissemination by reducing . . . costs . . . and can enhance the value of material made available over the network because of the ease with which it can be linked to other valuable material."[146] Thus, technological innovation that results in novel applications of copyright law presents an opportunity to consider how to best define the scope of copyright protection to serve public policy interests.[147]

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142 *See id.*

143 *See id.*

144 Jessica Litman, Digital Copyright 106–08 (2001).

145 *Id.* at 108.

146 *Id.*

147 *See id*. at 106–08; Goodyear, *supra* note 8, at 103–09 (chronicling the adaptation of copyright in response to technological innovation in the sync context and acnowledging that "it is important to periodically reevaluate extant copyright law to determine if this balance [between protection and access] is met").

Accordingly, this Part argues that a private licensing regime for UGC sync, created in the absence of doctrinal precedent, is undesirable because private parties are not concerned with the balance between exclusive rights and public access that copyright law seeks to maintain.[148] In particular, the private licenses between TikTok and rightsholders can influence fair use determinations because the existence of an active licensing market can weigh against fair use.[149] And since users are not a party to these licenses, there is no guarantee of protection for their interests and creativity.[150] Further, UGC on TikTok, particularly viral memes, represents a "new creativity" that is beneficial for both the music industry and society at large, such that exceptional treatment under copyright law could be justified.[151]

A. Private Ordering in a Gray Area

1. Fair Use in This Area is Uncertain

Privately negotiated licenses provide some level of predictability for platforms and users by defining conditions that will guarantee freedom from liability.[152] However, that clarity may also come at the cost of public access. As Professor James Gibson writes, "licensing is not only an output of the system of entitlements that intellectual property law creates, but an input into that system as well."[153] In other words, copyright law grants rightsholders the ability to restrict use of their work unless they grant a license, which in turn may influence

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148 *See* Tang, *supra* note 17, at 776–82 (highlighting the ways that private contract law influences copyright law).

149 *See* Gibson, *supra* note 10, at 884–85; Tang, *supra* note 17, at 778 ("If a music publisher can show . . . it has always been able to receive licensing revenue for uses of its music . . . on digital platforms regardless of the content, a court might be persuaded that such uses must always be licensed . . . .").

150 *See generally* Tang, *supra* note 17 at 758 ("[T]he rights that copyright holders have obtained through contracts with powerful digital intermediaries are beginning to look precisely like the exclusive rights created by the Copyright Act—applying to millions of strangers who have never seen, or even know, that such contracts exist.").

151 *See* Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. Rev. 453, 550–60 (2022) (arguing that in contemporary creativity, memes and visual digital culture rely on a model of contributory authorship dependent on copying to create new expression).

152 *See, e.g.*, Tang, *supra* note 17, at 765 (highlighting an example of YouTube's privately negotiated licensing scheme with large content owners). These contracts are often confidential, though the terms of the agreement are also imposed on users through broad terms of service. *See id.* at 757–58, 758 n.20 (internal citation omitted) (highlighting an example of expansive and general terms of service used by Facebook).

153 James Gibson, *Rights Accretion Redux*, 60 IDEA 45, 46 (2020); *see also* Tang, *supra* note 17, at 776–82 (citing Gibson, *supra* note 10, at 884) (arguing that private ordering on social media platforms for commercial and reproductive uses are "skewing [those gray areas] ever less gray").

the way that courts view the nature of the industry.[154] Thus, licensing in "gray areas" creates doctrinal feedback that often results in expansion of intellectual property rights beyond what has been set out by Congress or courts.[155] Because fair use is often not a sure thing, and damages awards for copyright infringement can be astronomical, parties will often choose to license rather than risk losing a case in court.[156] Over time, other parties follow suit and thus create an active licensing market for the use that is recognized by courts when considering a fair use claim.[157]

As discussed below, fair use is especially unsettled in this context. While some syncs would be easy to classify as fair use or not, many would be in the mushy middle.[158] This Note will focus on the first "purpose and character" factor and the fourth "market effect" factor because they are generally the weightiest in fair use cases; however, it is important to note that fair use is a balancing test that requires consideration of all four factors.[159]

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154 *See* Tang, *supra* note 17, at 776–82.

155 *See* Gibson, *supra* note 10, at 884–85; Tang, *supra* note 17, at 778 (explaining that "[i]f a music publisher can show . . . it has always been able to receive licensing revenue for uses of its music . . . on digital platforms regardless of the content, a court might be persuaded that such uses must always be licensed").

156 *See* Gibson, *supra* note 10, at 890 (finding the risks of an individual losing a fair use argument might mean the individual would face "not only a permanent injunction, but a myriad of other sanctions . . . that may far exceed any license fee she would have had to pay"); *infra* note 215 and accompanying text.

157 *See* Gibson, *supra* note 10, at 898–99 (highlighting a hypothetical and the risk-based system that positions parties to follow suit). An adaptation of this hypothetical to the platform context runs as follows. Say platform X knows that many of its users add copyrighted material to their content. Suppose it also knows that a good amount of those uses have a decent chance at a fair use claim because they are transformative and noncommercial. Given the consequences for liability it could face as the host of the content, it will likely choose to avoid liability by obtaining licenses for the material on the platform. Seeing platform X get licenses will encourage other platforms to do the same. It appears that this is what TikTok has done.

158 *See* Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 Notre Dame L. Rev. 499, 518 (2017) ("The openness of internet platforms has normalized the noncommercial appropriation of other peoples' content as an act of communication and expression. . . . Many of these acts of appropriation would easily qualify as fair use, many are arguable but not clear cut, and many are obviously not fair use."); Christopher Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. Irvine L. Rev. 805, 865 (2022) (applying the four-step fair use analysis of TikTok videos and concluding the strongest element of the analysis is "TikTok videos . . . do not harm, but rather enhance, the market for copyrighted work"); Goodyear, *supra* note 8, at 129–30 ("The synchronization of music as background in a film can, on occasion, qualify as fair use.").

159 *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978–2019*, 10 N.Y.U. J. Intell. Prop. & Ent. L. 1, 29 (2020) (finding that transformative uses nearly always qualify as fair uses, while commercial uses occasionally qualify, and that factor four "correlates most strongly with the overall test outcome"). As a reminder, the non-exclusive factors in the fair use analysis are: (1) "the purpose and character of the use;" (2)

a. Commerciality and Transformativeness

In the first factor of the fair use analysis, courts consider the "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[160] In *Campbell v. Acuff-Rose*, the Court criticized lower courts for interpreting prior precedent to hold that commercial uses are presumptively not fair.[161] In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, the Court again emphasized that the degree to which the secondary use "has a further purpose or different character" from the original "must be weighed against other considerations, like commercialism," a signal that though commerciality has some weight, it is not dispositive.[162] But despite these clear statements from the Supreme Court and the language of the Copyright Act itself, courts sometimes treat commerciality as a dispositive factor.[163]

To comply with TikTok's copyright policy, individual users must decide whether their uses are commercial or not.[164] By creating different music libraries for commercial and noncommercial uses, TikTok's policy suggests that commercial uses are presumptively unfair and should be treated differently from noncommercial uses, contrary to *Campbell*.[165] This effect is, essentially, "private practice influencing public, substantive law" because it places an inappropriate "emphasis on commerciality" as a classification tool that may be later taken into account by courts in a fair use determination.[166] Recall that TikTok's policy is vague and does not clearly address indirect monetization, which further complicates this kind of ex-ante classification.[167]

"the nature of the copyrighted work;" (3) the "amount and substantiality" of the work used; and (4) the effect of the use on the market for or value of the original. 17 U.S.C. § 107(1); *see supra* Section I.A.

160 17 U.S.C. § 107(1).

161 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) ("The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character."); *see also* Tang, *supra* note 17, at 777 (citing *Campbell*, 510 U.S. at 584) ("[The Court] specifically overturned the lower appellate court's holding that gave 'virtually dispositive weight to the commercial nature' of the infringing song at issue . . . .").

162 598 U.S. 508, 525 (2023).

163 *See* Beebe, *supra* note 159, at 29–30 (noting that there is a "continuing problem in the case law under the factor one commerciality analysis," in which courts inconsistently adopt a categorical rule against commercial fair uses); Beebe, *supra* note 34, at 602; Tang, *supra* note 17, at 777–78.

164 *See supra* Section I.C.

165 *Cf.* Tang, *supra* note 17, at 777–79 (arguing that Facebook's policy that "commercial use" is presumptively "unauthorized . . . shift[s] fair use doctrine as a whole back towards an emphasis on commerciality").

166 *Id.* at 778.

167 *See supra* Section I.C.

Though much UGC is noncommercial,[168] the commerciality analysis for digital platforms seems to be highly fact-dependent, and for some uses it may be difficult to predict whether courts will find that posting copyrighted material on social media is commercial.[169] Some cases have found commerciality and denied fair use for uses that benefitted the user, despite seeming noncommercial. A district court case in the First Circuit denied the fair use defense to nontransformative concert video posts even though the use was nominally noncommercial: Because the defendant posted copyrighted content that drove traffic to his YouTube channel without "paying the customary price," he "profit[ed] from exploitation of the copyrighted material."[170] In the Second Circuit, one district court found that a defendant failed to show that nontransformative use of a song in a political campaign video posted to social media was not commercial despite the political purpose.[171] The court also supported its first factor commerciality conclusion with fourth-factor considerations, noting that there was an existing licensing market for such uses and defendant had "sought to gain an advantage . . . without paying [the plaintiff] the customary licensing fee."[172]

Other cases have found nontransformative uses to be noncommercial where the link between use and profit was weaker. The Fifth Circuit found fair use where the nontransformative use of a book excerpt in a Twitter post was noncommercial because it was posted by a public school district for inspirational purposes, and not to enhance the reputation of the school's sports program.[173] Another district court found that there was a genuine issue of material fact as to whether a

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168 Barton Beebe, Bleistein*, The Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 Colum. L. Rev. 319, 389 (2017) (noting that most UGC is created because users "derive meaning from making it and sharing it. 'Commercial value' . . . is rarely the goal").

169 *See supra* notes 112–23 and accompanying text.

170 *See* Comerica Bank & Tr., N.A. v. Habib, 433 F. Supp. 3d 79, 93 (D. Mass. 2020) (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)); *id.* at 93–94 ("[Defendant] stood 'to gain recognition' . . . and 'benefitted by being able to provide the protected works free of cost.'" (quoting Penguin Grp. (USA) Inc. v. Am. Buddha, No. CV-13-02075, 2015 WL 11170727, at *4 (D. Ariz. May 11, 2015))).

171 *See* Grant v. Trump, 563 F. Supp. 3d 278, 287, 289 (S.D.N.Y. 2021) ("The video's overarching political purpose does not automatically make this use transformative . . . ."). *See also* Nat'l Acad. of Television Arts & Scis., Inc. v. Multimedia Sys. Design, Inc., 551 F. Supp. 3d 408, 423–25 (S.D.N.Y. 2021), *reconsideration denied*, 2023 WL 2138538 (S.D.N.Y. Feb. 21, 2023), *appeal docketed* (finding the nontransformative use was commercial even though the user did not derive direct income from the content because the video contained links through which viewers could pay for the creator's content).

172 *Grant*, 563 F. Supp. 3d at 287.

173 *See* Bell v. Eagle Mountain Saginaw Indep. School Dist., 27 F.4th 313, 318, 322, 325–26 (5th Cir. 2022).

defendant's Instagram post of a photograph of herself was fair use.[174] In declining to grant summary judgment for the plaintiff, the court gave little weight to the "slightly commercial" use because the defendant did not profit directly from the post via direct payment or by placing it next to advertisements.[175] This was in spite of the fact that the defendant was an influencer and her for-profit feed linked to her online store.[176] Thus, it appears that, for nontransformative uses, whether a UGC use is commercial or not requires a case-by-case evaluation that may vary from circuit to circuit. And because commerciality itself is but one factor to be evaluated, the outcome of that assessment may or may not result in a finding of fair use.[177]

Like commerciality, transformativeness is difficult to determine ahead of time. In *Warhol*, the Supreme Court made clear that whether a secondary work has a different character or purpose is a "matter of degree," and that "the degree of transformation required to make 'transformative' use of an original work must go beyond that required to qualify as a derivative."[178] In other words, users must now ascertain not only whether their use is transformative, but also the *degree* of transformation, and whether that makes it more or less likely that it will compete with the original work.[179] In considering the purpose of the work, "[t]he use of an original work to achieve a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or 'supplant[],' the work," and thus weigh against fair use.[180] But the court did not specify at what level of generality to evaluate the purposes of each work, nor at what point new expression might be substantial enough to outweigh a similar purpose.[181] While the *Warhol* Court cited *Campbell* for its transformativeness analysis, the

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174 *See* O'Neil v. Ratajkowski, 563 F. Supp. 3d 112, 130, 134 (S.D.N.Y. 2021); *see also* N. Jersey Media Grp. Inc. v. Pirro, 74 F. Supp. 3d 605, 618–19 (S.D.N.Y. 2015) (finding a genuine issue of material fact as to whether a for-profit news service's social media post was commercial because it was intended to promote engagement but there was no evidence that the use directly increased revenue).

175 *See O'Neil*, 563 F. Supp. 3d at 130.

176 *See id.*

177 *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 531 (2023) ("The commercial nature of the use is not dispositive. . . . But it is relevant. As the court explained in *Campbell*, it is to be weighed against the degree to which the use has a further purpose or different character." (citations omitted)).

178 *Id.* at 510.

179 *Id.* at 528–29 ("The larger the difference, the more likely [it] weighs in favor of fair use."); *see also* Restatement of Copyright, *supra* note 29, § 6.12.

180 *Warhol*, 598 U.S. at 528 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985)).

181 Kyle Jahner, *Warhol Fair Use Ruling Reframes Appropriation Art Legal Fights*, Bloomberg L. (May 30, 2023, 5:05 AM), https://news.bloomberglaw.com/ip-law/warhol-fair-use-ruling-reframes-appropriation-art-legal-fights [https://perma.cc/FS5G-HJAB].

Court seemingly narrowed the scope of transformativeness and further complicated the evaluations that a potential secondary user must undergo.[182]

Syncing necessarily adds new video elements to the original musical work, but that alone does not guarantee either transformativeness or fair use.[183] However, TikTok users could potentially transform the meaning or message and purpose of a song by adding new creative expression.[184] For example, SZA's *Saturday Night Live* musical skit entitled (and showing appreciation for) "Big Boys" became a viral TikTok meme.[185] In a clever take, a public library posted a video in which a librarian shows an appreciation for large-print books instead of the eponymous "Big Boys," while syncing her movements to the SZA song.[186] Though this type of video is unlikely to be judged a transformative parody,[187] it still might be argued that syncing the song over a demure video about a different kind of "big boy" recontextualizes and transforms the meaning of the song. Additionally, it might be argued that the purpose of the librarian's video is educational, and that she seeks to inform library patrons about available large-print titles, while SZA's song has some other purpose. Even if this particular use is not transformative, at least some of the half-million TikTok videos using the SZA song may be closer to the line.[188] There is no clear answer to this question, creating the kind of doctrinal uncertainty that leads to overcautious behavior and doctrinal feedback.

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182 *See id.* (citing Professor Amy Adler as saying, "*Campbell* said greater transformation negated a use's commercial nature, while *Warhol* framed commerciality as negating a work's transformative nature," which "has changed how courts are going to evaluate the first factor").

183 *See Warhol*, 598 U.S. at 526, 537–38 (holding that even though defendant added new expression to the original work, it was commercial, used for "substantially the same purpose" and not transformative, thus the first factor weighed against defendant and the use was not fair use); *see also* Sag, *supra* note 158, at 519 (noting that a "video [that] simply synchronizes [an] entire romantic ballad . . . with appropriate and harmonious photos of peaceful scenery" would not be fair use, as it "lacks transformative purpose" and could serve as a substitute in the market).

184 *See* Buccafusco & García, *supra* note 158, at 865.

185 Brittanie Shey, *Harris County Library Goes Viral with TikTok SZA Parody*, Chron (Mar. 3, 2023, 4:44 PM), https://www.chron.com/culture/article/tiktok-harris-county-17818917.php [https://perma.cc/7VXZ-GNKA].

186 *See id*.

187 The video does not appear to "comment[] on that [prior] author's works" or have "critical bearing on the substance or style of the original . . ." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).

188 *See* Derrick Rossignol, *SZA Is So Amused By How Popular Her Silly 'SNL' Song 'Big Boys' Has Become On TikTok*, UPROXX (Dec. 23, 2022), https://uproxx.com/music/sza-snl-big-boys-tiktok-popular-saturday-night-live [https://perma.cc/PM4G-93GU] (finding over a half million videos using the song).

Many common types of videos will likely fall into a gray area for this first factor. Consider some hypotheticals: A celebrity chef plays a song over an educational video demonstrating how to prepare a dish, which happens to be a recipe she herself created, and she edits the video to line up just right with the musical changes in the song. An educational use could have a strong claim to fair use, especially if it is just for the benefit of her followers or to show her creative expression through cooking.[189] But perhaps the outcome would change if she tells her viewers about the upcoming release of her cookbook, or if she does not have a book deal yet but hopes to acquire one by becoming a viral presence on TikTok. The analysis would change again depending on whether the use is deemed transformative. An expressive video synced to an advertising jingle could possibly be a transformative fair use because the purpose of the jingle is to sell a product, while the purpose of the artistic video is to comment on consumerism.[190] These hypotheticals illustrate that fair use is "flexible," and that "application may well vary depending on context,"[191] while the relevant facts of any given TikTok video may differ substantially from the next. It is also important to note that many of the videos on TikTok are memes, which tend to be transformative because they almost always function by recontextualizing or combining the original work with other elements to create new meaning.[192]

b. Effect on the Market for the Original

The fourth factor of the fair use analysis looks to "the effect of the use on the potential market for or value of the original."[193] To avoid the unpredictability of fair use, or to avoid litigation altogether, some users will obtain a potentially unnecessary license even if they have a colorable claim to fair use.[194] When enough parties do this, it creates a feedback loop that tends to entrench rightsholders' positions.[195] Courts have found that uses are less likely to be fair when the copyright holder already successfully exploits an existing licensing market for the use.[196]

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189 *See supra* note 37 and accompanying text; 17 U.S.C. § 107(1) (highlighting the educational purpose as weighing in support of fair use).

190 This hypothetical is a twist on an example the Supreme Court used to illustrate the concept of different purpose. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 538–40 (2023).

191 Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021).

192 *See generally* Adler & Fromer, *supra* note 151, at 479–82 (highlighting how memes recontextualize and combine other memes to imbue new meaning into a given work).

193 17 U.S.C. § 107(4).

194 Gibson, *supra* note 10, at 898–99 (explaining the cycle that creates an active licensing market).

195 *Id.*

196 *See supra* note 152 and accompanying text.

Consequently, private licensing arrangements make it more likely that a court will accept that a protectable licensing market exists, which makes it more likely that the fourth factor will weigh against fair use.[197] This, in turn, will encourage the creation of more private licensing arrangements.[198]

TikTok has already obtained licenses from rightsholders without a court ever confronting whether UGC synchronization is a fair use.[199] A future court may very well acknowledge these existing licensing markets and therefore find that the fourth factor weighs against fair use, and that licenses should be required for all UGC on TikTok.[200] In short, this doctrinal feedback created by the actions of private parties would expand the scope of copyright by limiting fair use.[201] This could then upset the balance of copyright and constrain access more than is justified by the incentives to create, restricting the ability of secondary users to build on works in way that a court might permit were it not for the preexisting licensing market.[202]

This feedback loop problem is especially harmful because there is a strong argument that the fourth fair use factor would favor much of the UGC on TikTok. Without factoring in the circular analysis, at least some TikTok videos do no not serve as a substitute for purchasing a track or playing a licensed royalty-generating stream, therefore likely qualifying for fair use.[203] Additionally, as discussed in the next Section, these videos can often enhance the value of the underlying copyrighted work.

2. New Users, New Uses

An inquiry into how copyright should adapt to new technology and new users is nothing new. Protectable works under the first Copyright Act were limited to maps, charts, and books;[204] but Congress and courts have expanded the scope of copyright in response to technological innovation to include works such as photographs and software.[205]

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197 *See* Gibson, *supra* note 10, at 898–99 ("[T]he existence of the licensing market militates against a fair use finding.").

198 *See id.*

199 *See infra* Section II.A.2.

200 *See* note 152 and accompanying text.

201 *See* Tang, *supra* note 17, at 776 ("[B]ecause certain doctrines—most notably, fair use—. . . specifically take industry practice into account, what parties privately contract for may also eventually affect the public, substantive law of copyright.").

202 *See id.* at 774–75; *supra* Section I.A.

203 Buccafusco & García, *supra* note 158, at 865.

204 *See* Goodyear, *supra* note 8, at 103 (citing Copyright Act of 1790, ch. 15, 1 Stat. 124).

205 *See id.* at 103–04 (citing Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (photographs); Act of Dec. 12, 1980, Pub. L. No. 96-517, § 117, 94 Stat. 3015, 3028 (computer programs)).

Conversely, the scope of copyright has also contracted in response to socially valuable technological innovation that enhances access to copyrighted works without displacing the market for the original.[206]

Today, digital social media presents an issue for the reach of copyright law. Smartphones and accessible video technology through apps like TikTok have exposed the relatively small licensing market for synchronization rights to an exponentially larger group of potential users.[207] It has never been easier to sync a song to a video. But we are working with a licensing scheme built for twentieth-century technology that simply did not comprehend a vast market for sync.[208] As Professor Michael Goodyear has noted, "[T]his historical trend of courts and Congress adapting copyright to new technologies is needed once again. . . . [S]ynchronization rights now encompass a much wider range of content than was originally envisioned by the courts, suggesting a need for rebalancing."[209]

Case law up until this point has not squarely addressed whether sync licenses are required for UGC on a social media platform.[210] Because many TikTok videos consist of dance moves and lip syncs that are necessarily coordinated to the music, the recent Peloton case suggests that many TikTok videos would likely implicate this right.[211] Recent research has found that there are few cases that specifically deal with synchronization rights, and none of those have decided fair use as applied to sync.[212] In addition, fair use is often not asserted in music cases, and apart from the parody of another song,[213] "only one federal case has recognized . . . copying or borrowing parts" of another song to be fair use.[214] With such a lack of direct precedent, even if users are aware of

206 *See* Victor, *supra* note 26, at 1891 (arguing that valuating the social utility of utility-expanding technologies occurs on a spectrum).

207 *See* discussion *supra* Sections I.B, I.C.

208 *See* Goodyear, *supra* note 8, at 130.

209 *Id.* at 109.

210 This conclusion is based on the author's Westlaw research. This is also supported by the findings in Goodyear, *supra* note 8, at 117–18, 120–21, 123–24 and in Wyman, *supra* note 78, at art. 3. *See also supra* note 93 and accompanying text.

211 *See* Campbell, *supra* note 91 ("Peloton Interactive Inc.'s innovative stationary bikes synchronize recorded music with an instructor-led workout streamed through an app or on those bikes' screens. However, Peloton, and others like it, face a significant challenge with their musical offerings: a synchronization licensing gap."); *see also* Goodyear, *supra* note 8, at 134 ("[W]orks that depend on timed-relation between visuals and music would be captured by this definition of timed-relation. For example, fitness classes such as Zumba or SoulCycle depend in large part on the coordination of movements to music."); *supra* notes 100–02 and accompanying text.

212 *See* Goodyear, *supra* note 8, at 130.

213 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994) (holding that commercial parody of another's song could constitute fair use).

214 Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. Rev. 1873, 1876 (2018).

the possibility of a fair use defense ex ante, it seems unlikely that such knowledgeable users would risk even a colorable fair use claim when the maximum statutory penalty is $150,000 for *each infringed work*.[215]

Though the exact level of ambiguity in fair use doctrine may be debated,[216] the outcome of applying the fair use balancing test to UGC sync on TikTok seems unclear. As discussed *supra*, with little direct precedent to guide the parties involved, we are left with a doctrinal gray area that implicates millions of users. Private licenses have stepped in to fill the gap, but this Note argues that Congress and courts are the more appropriate entities to elucidate the scope of copyright in this context.

B. UGC Sync Deserves Special Treatment

Many scholars have noted that though copyright's generally stated purpose is to protect authors from secondary users who take without permission, copyright law sometimes condones socially beneficial unauthorized uses of protected work.[217] Fair use and compulsory licenses are two salient examples of this phenomenon.[218] Assuming that synchronizing a song to video on TikTok does in fact implicate the sync right, this Section argues that UGC on TikTok is a socially beneficial use that does not diminish the value of the original work and should be afforded special treatment by copyright law.[219]

TikTok has become an invaluable tool for commercial music success, and this remains true regardless of one's position on the quality

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215 17 U.S.C. § 504(c) (enacting the range of statutory damages for non-willful infringement from $750 to $30,000 and up to $150,000 for willful infringement); *see* Goodyear, *supra* note 8, at 128 ("[T]he uncertainty of when sync rights apply to . . . new forms of content has caused over-enforcement and apprehension about being liable for copyright infringement. . . . [This is in part because] the amount of statutory damages that can be available to the copyright owner . . . can be as high as $150,000 per infringement."); Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. Copyright Soc'y USA 371, 392 (2017) ("[T]he statutory penalties for infringement . . . can run to $150,000 per infringed work . . . .").

216 *See* Sag, *supra* note 158, at 518 (noting that, in the social media context, "[t]he ambiguity of fair use has been frequently overstated, but even though the relevant principles are fairly clear, applying those principles to the facts leaves some gray areas"). For further reading on this topic, see, for example, Beebe, *supra* note 159, at 37 (concluding, based on empirical analysis, that "surprisingly, when viewed as a whole, the fair use case law presents itself as far more stable and predictable—and unchanging—than the headline-making cases might suggest"); Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47, 86 (2012) (concluding, based on empirical analysis, that "fair use is not nearly so incoherent or unpredictable as is conventionally assumed").

217 *See, e.g.*, Adler & Fromer, *supra* note 151, at 463–64; Victor, *supra* note 11, at 937.

218 *See, e.g.*, Adler & Fromer, *supra* note 151, at 463–64; Victor, *supra* note 11, at 937.

219 *See supra* Section I.C. For a related argument, see Adler & Fromer, *supra* note 151, at 550–60 (discussing examples of new types of creativity on TikTok such as dance trends, cover songs, and musicals).

or substance of TikTok content.[220] In some ways, the music industry has become more democratized because creation and production costs for music have dropped significantly and it has never been easier to write, record, and distribute a song on the internet.[221] This has led to a proliferation of music, and the difficulty now is getting anyone to listen.[222] Virality on TikTok is one of the most powerful ways for a musician to break out,[223] and virality is not possible without TikTok creators using their song. Labels themselves recognize the value of TikTok as a tool, as shown by concerted efforts to have artists time their releases to viral moments and establish a strong presence on the platform.[224] Importantly, when creators on TikTok use or copy a song to make a video meme, the viral attention drives fans to royalty-producing streaming platforms and to noncopyable concert experiences—experiences from which the music industry directly benefits.[225] But from a conventional copyright standpoint, if it were not for the licenses TikTok has negotiated, many users would be exploiting original works without paying the customary price and would therefore be infringing.[226] Copyright law here serves

220 *See supra* Section I.C.

221 *See* Buccafusco & García, *supra* note 158, at 861–62; Sheldon Rocha Leal, *Democratisation of the Music Industry, Vol. 2: Music Business Infrastructure*, Medium (Sept. 21, 2020), https://medium.com/@shelrochaleal/the-democratization-of-the-music-industry-9e3e38b1bb1d [https://perma.cc/6YTN-9MSY].

222 *See* Buccafusco & García, *supra* note 158, at 861–62; Jake Linford, *Copyright and Attention Scarcity*, 42 Cardozo L. Rev. 143, 160 (2020) ("Consumers and creators . . . no longer face scarcity of information. The scarce resource is attention."); Draughorne, *supra* note 3 (quoting Bill Werde, director of Syracuse University's Bandier music program, as saying, "[W]hen you lower that barrier of entry, it becomes very difficult to break through. Major labels, and other companies and artists with substantial marketing budgets, were really advantaged on Spotify"); Adler & Fromer, *supra* note 151, at 487.

223 *See* Buccafusco & García, *supra* note 158, at 836, 863 (noting the high view counts of TikTok videos with music and that TikTok enabled Lil Nas X to go viral); Tim Marcin, *Meet the Indie Musicians Who Are Making a Living on TikTok*, Mashable (Nov. 25, 2022), https://mashable.com/article/indie-artists-musicians-tiktok [https://perma.cc/6JW5-BSZD] (explaining how TikTok "democratizes the discovery process for indie artists" by providing a platform to gain exposure and build a fan base); Dredge, *supra* note 128 (quoting Ole Obermann, TikTok's global head of music, as saying that having a video go viral is like having "a team of a million marketers and promoters working on your behalf").

224 *See* Kelsey Weekman, *Artists Are Complaining About Their Record Labels Forcing Them to Make TikToks, But That's Nothing New*, BuzzFeed News (May 26, 2022, 4:57 PM), https://www.buzzfeednews.com/article/kelseyweekman/halsey-tiktok-trend-label-complaint [https://perma.cc/P73K-CYMN] (discussing artist complaints about the significant pressure they feel from labels to post on TikTok).

225 *See supra* notes 136–43 and accompanying text; Raustiala & Sprigman, *supra* note 138, at 222–23 (noting that, today, "recordings often function more as ads for concerts than as money-makers themselves").

226 *See supra* Section II.A.1; *cf.* Grant v. Trump, 563 F. Supp. 3d 278, 287 (S.D.N.Y. 2021) ("[T]here is a well-established market for music licensing, but the defendants sought to gain an advantage by using [plaintiff]'s popular song without paying [plaintiff] the customary licensing fee.").

not to incentivize expression in the form of UGC but rather to "suppress democratic aesthetic practice and participation" because it protects songs that are "central to cultural conversation and important sources of shared meaning" from "appropriation and redefinition."[227]

All this music-oriented creativity may be in jeopardy. These licenses are voluntary, and TikTok's music library would cease to exist, or would be greatly reduced, if TikTok and rightsholders fail to reach an agreement at the next renegotiation.[228] If the licenses vanish, TikTok users may still create content, but they would lose the freedom of a secure catalog. They would be put back into the § 512 "notice-and-takedown" regime[229] and subject to all its widely discussed perils and deficiencies.[230]

Licensing terms may also create a "risk of suppression" for creators who wish to use music to help communicate ideas that rightsholders could deem objectionable.[231] Though rightsholders' ability to suppress speech and certain types of creativity via private license is less robust

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227 Beebe, *supra* note 168, at 390–91.

228 *See supra* note 15 and accompanying text; Adler & Fromer, *supra* note 151, at 555 n.507; *supra* notes 214–17, 226 and accompanying text.

229 *See* Tang, *supra* note 17, at 761–64 (explaining that digital platforms often choose to rely on private contracts rather than rely on the default § 512 public law protections from copyright liability). The notice-and-takedown regime refers to a basic requirement for safe harbor eligibility granted by § 512 of the Digital Millennium Copyright Act (DMCA), in which internet platforms must remove allegedly infringing content if "they receive a specific notice from the copyright owner." Sag, *supra* note 158, at 503; 17 U.S.C. § 512. In exchange for compliance with this and other measures, platforms are granted immunity from secondary liability for infringing content posted on their sites. Sag, *supra* note 158, at 502–03.

230 *See* Tang, *supra* note 17, at 761–63 (discussing such perils and deficiencies, namely litigation-related uncertainty); *see, e.g.*, Sag, *supra* note 158, at 525–26, 535 (noting that § 512 does not sufficiently deter rightsholders from sending incorrect or fraudulent takedown notices without due diligence and that there are few incentives for content creators to file counternotifications); Daniel Seng, *Copyrighting Copywrongs: An Empirical Analysis of Errors with Automated DMCA Takedown Notices*, 37 Santa Clara High Tech. L.J. 119, 184–85 (2021) (concluding that "the use of automated solutions [for takedown requests] has been allowed to operate unchecked, and without clear metrics to ensure their transparency and accountability to the Internet community and to mitigate their opportunities for misuse and abuse"); Martin Husovec, *The Promise of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?*, 42 Colum. J.L. & Arts 53, 54–55 (2018) (considering arguments by rightsholders that the notice-and-takedown system puts too great a burden on rightsholders and that an automated system with more responsibilities for intermediaries would be preferable).

231 *See* Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 Berkeley Tech. L.J. 1447, 1482–83 (2014) ("The always-license model inevitably entails pervasive suppression of expression, further threats to privacy and to the individual and social benefits of noncommercialized communities, and constrained competition."); Adler & Fromer, *supra* note 151, at 542–44 (noting that the potential for "selective enforcement [of copyright infringement] raises potential free speech concerns"); DeLisa, *supra* note 20, at 1304–05 (arguing that "[a] compulsory licensing system would ameliorate th[e] chilling effect" from the threat of infringement litigation).

than in preemptive removal systems such as YouTube's Content ID,[232] licensing music for certain uses but not others could influence users to choose a song that they know is licensed, even if it is not one they would have otherwise picked. While some argue that creativity constraints are not necessarily negative from a normative standpoint,[233] in this case these are artificial constraints imposed by rightsholders to extract value from a market to which they may or may not be entitled by law.

Platforms and rightsholders are the parties involved in negotiations, and users do not have a say.[234] Thus, users have no advocate unless the platform is incentivized to bargain to protect user rights and creativity.[235] There is no guarantee that a platform will do this. Even if calls for transparency in content moderation are successful,[236] some have argued that "privately negotiated licenses can never be comprehensive."[237] As seen with TikTok's licenses, influencers who wish to sync music with ad-sponsored video content (which could in theory be fair use, despite being commercial) have a much smaller catalog from which to choose, and security for creativity is limited to the commercial library unless the influencer is able to clear the hurdles of negotiating an individual license.[238]

Further, some recent actions taken by TikTok indicate that the platform is open to experimenting with an operating model other than

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232 *See* Tang, *supra* note 17, at 772–73 (describing an agreement between Facebook and rightsholders allowing for rightsholders to request takedowns if they have bona fide concerns); DeLisa, *supra* note 20, at 1304–05 (noting that when a DMCA takedown occurs, content is taken down "for a statutorily provided period of at least 10 business days" until the counter-notice is processed, and that Content ID indirectly encourages rightsholders to "abuse the system under the DMCA" because "the process of adjudicating claims . . . is . . . biased in their favor").

233 *See* Rebecca Tushnet, *Free to Be You and Me? Copyright and Constraint*, 128 HARV. L. REV. F. 125, 125–28 (2015) (discussing and challenging the potential benefits of copyright constraints).

234 *See* Tang, *supra* note 17, at 758 (arguing that "the rights that copyright holders have obtained through contracts with powerful digital intermediaries are beginning to look precisely like the exclusive rights created by the Copyright Act—applying to millions of strangers who have never seen, or even know, that such contracts exist").

235 *See id.* at 763–64 (describing how platforms and copyright holders negotiate to serve both parties' interests).

236 *See, e.g.*, *id.* at 801–02 (arguing that legislation intended to increase content moderation transparency should also address copyright moderation decisions).

237 *See* Tushnet, *supra* note 231, at 1482–84 (arguing that private licenses "can never be comprehensive" enough to replace fair use because "[l]icenses will inevitably leave many creators out in the cold, especially noncommercial remixers," and "privately negotiated licenses will always retain censorship rights, thus leaving creators of transformative noncommercial works at risk of suppression").

238 *See id.* at 1483 ("To claim that licenses can replace fair use because some participants within each market are willing to license most of the time is to advocate the suppression of all fair uses that rely on works that aren't within the licensing scheme.").

one reliant upon blanket licenses for music. In February 2023, TikTok conducted an experiment in which select Australian users were not allowed to use the general creator library and could only access the SoundOn catalog.[239] Some users were understandably upset,[240] and others criticized TikTok for harming the creators and musicians who made the app a success.[241] One interpretation of the experiment is that it is designed to test trends and user access, but some members of the music industry believe that the move was intended to increase TikTok's bargaining power ahead of license renegotiations by proving that the app did not need music industry support.[242] Regardless of the intent, the experiment shows that these licenses indeed exist at the behest of the platforms and the music industry and could be dispensed with should they no longer be worth the time and expense. UGC thrives on TikTok in part because of the licensed music library; losing the licensed library would put users back in the unpredictable § 512 notice-and-takedown regime.[243]

Removing the entirety of the externally licensed catalog seems extreme and unlikely, but platforms in the past have innovated around the high cost of licensing by creating their own content.[244] Perhaps the most well-known example of this is Netflix. Though it continues to license, Netflix has attempted to overcome the high costs of its license-dependent business model by creating its own content and becoming a viable competitor in the movie industry.[245] TikTok's SoundOn platform

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239 *See, e.g.*, Dylan Smith, *ARIA Fires Back Against TikTok's Song Restrictions in Australia: 'An Attempt to Downplay the Significance of Music'*, DIGIT. MUSIC NEWS (Feb. 17, 2023), https://www.digitalmusicnews.com/2023/02/17/tiktok-australia-test-pushback [https://perma.cc/V7MY-TTSW] (describing TikTok's experiment).

240 *See* Peoples, *supra* note 16 ("[E]vidence that some Australians are unhappy members of the test cohort can be seen on Twitter.").

241 *See* Emma Wilkes, *TikTok's "Iron Grip" Risks Short-Changing British Musicians, MP Warns*, NME (Mar. 5, 2023), https://www.nme.com/news/music/tiktoks-iron-grip-is-short-changing-british-musicians-mp-warns-3408471 [https://perma.cc/SHF6-YE3H] (describing Damian Collin, a conservative Member of Parliament, as "criticis[ing] the app for giving artists and songwriters little in return for their contributions to its success").

242 *See* Peoples, *supra* note 16.

243 *See* Tang, *supra* note 17, at 761–64 (explaining that digital platforms often choose to rely on private contracts rather than rely on the default § 512 public law protections from copyright liability).

244 *See* Raustiala & Sprigman, *supra* note 136, at 1585–87, 1597 (discussing Netflix and Spotify's efforts to reduce their licensing costs); Tang, *supra* note 23, at 1187 ("If paying for content licenses becomes a losing business proposition, then perhaps the only way forward will be for licensees to head toward a future where no licenses are required at all. The licensees will become the licensor—the content creator and the distributor one and the same.").

245 *See* Raustiala & Sprigman, *supra* note 136, at 1585–87 (describing Netflix's turn to content creation); Tang, *supra* note 23, at 1187 ("Netflix and Amazon are acting as movie and television production studios.").

not only integrates itself in the music industry by serving as a licensing intermediary for independent artists—it also might make TikTok a more formidable competitor by using its vast trove of user data to offer curated, house-made songs for content creation, all while reducing its operating costs.

Even though TikTok drives fans to income-generating streams and concerts, a common refrain from the music industry is that digital platforms harm artists by failing to pay appropriately high royalty rates.[246] But direct licenses with platforms negotiated without any government oversight do not necessarily obligate labels or publishers to share any of those proceeds with artists.[247] Additionally, internal policies or terms in private contracts can also become directly enshrined in public law through administrative rate-setting proceedings before the CRB.[248] Thus, because there is no obligation to disclose the terms of these licenses, copyright law is sensitive to industry practices in ways that are unknown to the general public.[249]

Another concern with costly licenses negotiated by dominant market participants is that such licenses may harm competition by pricing out smaller competitors and preventing them from having access

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246 *See, e.g.*, Dylan Smith, *The Major Labels Are Reportedly Demanding a Slice of TikTok's Shrinking Ad Revenue Amid Licensing Negotiations*, DIGIT. MUSIC NEWS (Nov. 9, 2022), https://www.digitalmusicnews.com/2022/11/09/major-labels-tiktok-licensing-negotiations [https://perma.cc/9M27-2TCA] (noting that Universal Music, Sony Music, and Warner Music have demanded part of TikTok's advertising revenue and have requested greater royalties); *When Will TikTok Start Paying the Music Industry 'Properly'?*, MUSIC BUS. WORLDWIDE (July 6, 2022), https://www.musicbusinessworldwide.com/podcast/tiktok-start-paying-the-music-industry-properly [https://perma.cc/QN56-YY2N] (quoting Tim Ingham, Music Business Worldwide's founder, as saying, "[t]he music industry is growing increasingly worried that . . . [TikTok is] 'building its business off the back of artists' without paying those artists what they deserve.").

247 Tang, *supra* note 17, at 792–94 ("[T]he common refrain that artists do not earn a penny from streaming oftentimes has nothing to do with alleged low royalties paid by streaming services—and everything to do with the fact that, in direct deals generally, royalties are paid directly to music publishers and record labels," without an attendant process for "accounting to songwriters or musicians."); Loren, *supra* note 69, at 2521 ("We like to think that more money for the middlemen translates into more money for the authors and artists, but it is hard to know if this is really true.").

248 Tang, *supra* note 17, at 782–84 (describing examples of how "streaming services' own internal policies" and private agreements have "eventually translated to substantive, public copyright regulations").

249 *See id.*; Tatiana Cirisano, *TikTok Signs Licensing Deal with Sony Music, Hiking Payouts to Labels*, BILLBOARD (Nov. 2, 2020), https://www.billboard.com/pro/tiktok-licensing-deal-sony-music-entertainment-payouts-labels [https://perma.cc/8V4F-VTZ9] (noting that many terms of the licensing deal between Sony and TikTok were not disclosed); *see also* Jacob Kastrenakes, *TikTok and Sony Music Reach a Long-Awaited Licensing Deal*, VERGE (Nov. 2, 2020, 3:18 PM), https://www.theverge.com/2020/11/2/21546323/tiktok-sony-music-licensing-deal-labels-app [https://perma.cc/STY7-SZ3P] (noting that neither TikTok nor Sony would disclose "any real details about what this means for TikTok users").

to the same libraries of licensed content.[250] As discussed previously, comprehensive music libraries are an important tool for contemporary UGC.[251] Smaller platforms may be unable to match the previous licensing deal or unable to negotiate a deal that is as favorable as the first one.[252] It seems reasonable to suggest that a social media platform that provides users with the security of knowing that their content will not be removed for copyright violations is likely going to be more competitive than a platform that cannot.[253]

In sum, though private ordering has reduced transaction costs and created a large degree of stability and control for both rightsholders and TikTok, the current system prioritizes these parties over users and their important creative content while simultaneously threatening a key copyright doctrine that protects users and the public. The private licenses between TikTok and rightsholders expand the scope of copyright without due consideration of the fact that public access to musical works enables creativity that supports the original rightsholders.

III
Preserving the Balance with a Compulsory License

This Note argues for a blanket, compulsory license for noncommercial user-generated content (UGC) to better preserve copyright's balance, compared to the currently negotiated sync licenses. This license would be administered by a semigovernmental Synchronization Licensing Collective (SLC) modeled after the Mechanical Licensing Collective (MLC), with rates set based on a policy-driven standard by the Copyright Royalty Board (CRB).[254] This Part will begin by describing the proposal and the complexity of a noncommercial distinction

250 *See* Tushnet, *supra* note 231, at 1466–67 (discussing this risk in the context of YouTube); Tang, *supra* note 23, at 1185–86 ("[D]ominant firms . . . can . . . use content as a loss leader, subsidizing the high cost of content licenses with their other business lines.").

251 *See supra* notes 220–43 and accompanying text.

252 *See* Tushnet, *supra* note 231, at 1467 ("[N]ew entrants can rarely cut the same deals as earlier [competitors].").

253 *See id.* at 1485 (arguing that "[l]icensing protects monopolies by creating higher barriers to entry than fair use" because competitors must also acquire licenses, whereas the finding of fair use "allows other entities to do the same thing" even without significant resources).

254 To refresh, a blanket, compulsory license grants a potential user permission to use all copyrighted works in a particular catalog if the user complies with statutory requirements; the copyright holder cannot refuse the request. *See supra* notes 50–58 and accompanying text. The Mechanical Licensing Collective (MLC) is a semigovernmental body tasked with administering the § 115 compulsory license, while the Copyright Royalty Board (CRB) is the adjudicatory body that determines the statutory rate. *See supra* notes 62–68 and accompanying text; *see also* 17 U.S.C § 115. Other commentators have suggested that establishing a sync rights clearinghouse would be a difficult but worthwhile solution. *See* DeLisa, *supra* note 6, at 1301–12; Campbell, *supra* note 91 ("A clearinghouse for synchronization rights combined

in Section A. Section B will argue that this regime would maintain the balance of copyright more effectively than the status quo. Because this implementation would be very similar to the regime created by the Music Modernization Act (MMA), Section C will conclude by comparing contemporary circumstances to those that led up to the enactment of the MMA.

A. A Blanket, Compulsory License for Noncommercial UGC Sync

If parties rely on the compulsory license rather than the current private licensing scheme, a collective administrator will be necessary to handle the transaction costs of royalty allocation and distribution.[255] That is where the SLC comes in. When users sync music to video content, the platform would act as the intermediary by logging the uses, much like Spotify or Apple Music does with mechanical royalties.[256] Platforms that host UGC would then obtain sync licenses for both the musical composition and the musical recording by issuing notice and paying royalties to the SLC, which the SLC would disburse to rightsholders.[257] This system would track on to the current MLC, perhaps sharing infrastructure and increasing resources. For example, the SLC could build upon the database that the MLC has started by cataloging sound recording rightsholders as well as continuing to add to the list of composition rightsholders.[258] The main distinction from the mechanical licensing scheme would be that the license would cover sync rights for both the musical composition and the sound recording, as opposed to the compulsory licenses for musical compositions regulated by § 115 and Title I of the MMA.[259] These licenses would be blanket and compulsory,

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with technological advances in steganography, cryptography and blockchain could help fill the sync licensing gap in the existing statutory and licensing framework.").

255 *See* Eric Priest, *The Future of Music Copyright Collectives in the Digital Streaming Age*, 45 COLUM. J.L. & ARTS 1, 1–2, 13–14 (2021) ("[E]stablishment of the MLC is intended . . . to remedy the composition copyright ownership data deficiencies by establishing an authoritative, centralized, publicly accessible ownership database. While the database will never be entirely complete or accurate, copyright owners are incentivized to make it as comprehensive and accurate as possible.").

256 *See What Is the Mechanical Licensing Collective "MLC"?*, TUNECORE, https://support.tunecore.com/hc/en-us/articles/360052000051-What-is-the-Mechanical-Licensing-Collective-MLC [https://perma.cc/JPC4-XVRY].

257 This would mirror the operation of the MLC. *See supra* notes 63–64 and accompanying text; 17 U.S.C. § 115.

258 *See supra* Section I.B.1. Another salient difference is that the MLC does not currently collect royalties from platforms like YouTube, Facebook, and TikTok. TUNECORE, *supra* note 256.

259 *See supra* notes 59–70 and accompanying text; *supra* Section I.B.1 (explaining that § 115 of the Copyright Act and Title I of the Music Modernization Act (MMA) regulate

meaning that prospective users may use any song for sync without first obtaining rightsholder permission.[260] Further, they would apply to any relevant platforms with UGC sync, such as YouTube or Instagram.

For practical purposes, these sync licenses would be limited to noncommercial UGC. Historically, successful copyright revision comes about when the affected industries agree on the substantive provisions through prelegislative negotiations and compromise, while failure of this process results in failure to change the law.[261] Synchronization rights are essentially a completely unregulated area in music licensing,[262] and rightsholders would not want to give up this freedom easily. But a compulsory license with a commercial use distinction seems more likely to succeed than one without such a distinction. The distinction represents a compromise like the first § 115 compulsory license: The noncommercial requirement limits the applicability of the compulsory license, thus taking fewer rights away from artists.[263]

Other considerations inform the feasibility of this proposal. First, sync licenses were traditionally only acquired by commercial movie and advertisement producers, thus noncommercial uses are not historically a market in which rightsholders have shown concern about the content of the accompanying video.[264] Second, copyright law has already made

compulsory licenses for musical compositions, while § 115 does not regulate mechanical licenses for sound recordings; additionally, a limited public performance right attaches to sound recordings but only for digital interactive streaming services).

260 *See* Priest, *supra* note 255, at 5. Section 115 details notice procedures with which digital platforms must comply. 17 U.S.C. § 115(a)–(b). Presumably, the new compulsory license would have similar requirements.

261 *See* Litman, *supra* note 144, at 36–38 ("The efforts to write copyright amendments that make specific provision for digital media relied heavily on interindustry negotiations and stalled whenever those negotiations stalled. Indeed, the informal understanding among copyright scholars and practitioners is that copyright revision is, as a practical matter, impossible except through such a process."); *see, e.g.*, Loren, *supra* note 69, at 2534 ("[T]he major industry players—both the music publishers and the digital music services—supported [Title I of the MMA] because it was the culmination of a lengthy negotiation process among them.").

262 Goodyear, *supra* note 8, at 116; *see also supra* Section I.B.2.

263 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, 279–80 (2011) (arguing for a statutory limitation on exclusive rights for UGC and noting that "[f]rom the perspective of the copyright holder, a non-commercial use requirement renders the exception or exemption a narrower one, which should be a more acceptable position for them").

264 *See* Passman, *supra* note 48, at 243–50 (describing fee ranges for motion pictures, television, streaming services, commercials, video games, bundled services, ringtones, and podcasts). Some artists have (famously) objected to the use of their music for certain purposes. For example, the Beastie Boys' Adam Yauch's will prohibits use of his music for advertising. RJ Cubarrubia, *Adam Yauch's Will Prohibits Use of His Music in Ads*, Rolling Stone (Aug. 9, 2012), https://www.rollingstone.com/music/music-news/adam-yauchs-will-prohibits-use-of-his-music-in-ads-243913 [https://perma.cc/V33J-BL4C].

carveouts in exclusive rights in musical works, generally for uses that will not serve as a threat to revenue streams for the original work, particularly if they have a strong tendency to drive up the original work's value.[265]

The UGC aspect is relatively straightforward and would likely be construed broadly to include original content produced by any user.[266] But deciding where to draw the commercial/noncommercial boundary will be more challenging.[267] Influencers who profit from their online presence should not be automatically barred from taking advantage of the compulsory license if the use can be properly classified as noncommercial. Courts in fair use cases have held that fair use determinations are to focus on the nature of the specific *use*, so it follows that the focus should not be on the *user*.[268] Thus, if the compulsory license is to be a function of copyright policy and somewhat aligned with fair use, then any guidelines will need to be applicable on a use-by-use basis. For a "professional" influencer that *directly* profits from sponsored posts, compliance with Federal Trade Commission (FTC) guidelines that require disclosure of "material connections" to the content could be one way to identify commercial uses of copyrighted material.[269] Of course,

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265 *See supra* notes 74–77 and accompanying text; *see generally* Buccafusco & García, *supra* note 158, at 850 (describing TikTok as not "compet[ing] with streaming or downloading any more than radio did with record sales"); Priest, *supra* note 255, at 2 (noting that "[m]usic licensing . . . has long been a heavily regulated market, controlled through a combination of compulsory licensing regimes, statutory limitations and *exceptions to exclusive copyright rights*, and cometition authority oversight" (emphasis added)).

266 This broad definition would be tempered by the noncommercial requirement. Some scholarship wrestles with the taxonomy of UGC, but this is outside the scope of this Note. For further reading on this topic, see, for example, Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841 (2009) (analyzing the tension between UGC and copyright, noting that UGC can range from being authored entirely by the user or being a substantial reproduction of a pre-existing work); Chik, *supra* note 263, at 247–49, 294 (proposing a narrow legal definition of UGC limited to content created for public sharing by noncommercial users as opposed to copyright holders); Santos, *supra* note 6 (offering a consolidated redefinition of UGC based on a multidisciplinary literature review).

267 *See* Chik, *supra* note 263, at 279–80 (noting the difficulty of defining "commercial purpose" and the importance of separating direct from indirect financial benefit for protection of UGC creators).

268 *See* Andy Warhol Found. for the Visual Arts v. Goldsmith, 598 U.S. 508, 533 (2023) ("The same copying may be fair when used for one purpose but not another."); RESTATEMENT OF COPYRIGHT, *supra* note 29, § 6.12 ("The Supreme Court in *Warhol* made clear that the fair use inquiry should focus closely on the particular use that the defendant made of the plaintiff's work and that is alleged to be infringing.").

269 *See* Lesley Fair, *New Brochure for Social Media Influencers*, FED. TRADE COMM'N CONSUMER ADVICE (Nov. 5, 2019), https://consumer.ftc.gov/consumer-alerts/2019/11/new-brochure-social-media-influencers [https://perma.cc/N8FQ-9DAZ] (directing influencers making endorsements to disclose when they have a "material connection" with the brand, such as direct payment or free or discounted products or services).

some influencers may fail to follow both FTC guidelines and copyright laws. Nonetheless, clarifying the law in this area might encourage more compliance and enable rightsholders to target their takedown requests more efficiently by focusing on influencer marketers.

It would be more challenging to draw the line when users *indirectly* monetize their content, which is very common for UGC on TikTok.[270] Courts have struggled to distinguish between commercial and noncommercial UGC in fair use cases,[271] and copyright's traditional rationales for commercial use seem to be an especially awkward fit.[272] But administrability on a large scale would likely require platforms to articulate a bright-line rule clearer than that which we have at present.[273] Ultimately, this is a technical issue that is outside the scope of this Note. Perhaps one option could be to classify something as commercial only when the user has currently secured direct compensation for the specific video, rather than posting a video in the hopes of future profitability.[274] This corresponds with the FTC guidelines for influencers,[275] though in the commercial speech context, ads that do not seem like ads might "straddle the line."[276]

Another practical problem in ensuring that royalties are properly distributed will be to implement a system that accurately attributes uses to rightsholders. On TikTok, users can upload songs through third-party apps so that the caption below the video reads "original sound."[277] If

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270 *See supra* Section I.C; Chik, *supra* note 263, at 280 ("[T]here may be some confusion in cases where the user generates content and acts as his or her own host. Celebrity bloggers have been known to derive *indirect* benefits including those from advertisement revenue merely based on the popularity of the website alone.").

271 *See supra* Section II.A.1.a.

272 *See supra* Section II.B.

273 *See supra* note 128 and accompanying text (explaining that TikTok requires businesses and creators who post "branded content or content for their own commercial purposes" to obtain individual licenses or use TikTok's in-house Commercial Music Library).

274 For a proposal suggesting an "objective-subjective" intent-based standard in the case of indirect benefits, see Chik, *supra* note 263, at 280 ("[T]he test of commercial purpose is an objective-subjective one based on the purpose and context of the UGC rather than actual and *indirect* commercial gain. An objective test is thus formulated from the user's subjective perspective and based on his or her bona fide motives and intentions.").

275 *See* Fair, *supra* note 269.

276 *See* Tushnet, *supra* note 116, at 721, 754 (arguing that "a significant economic benefit—whether past or expected—conferred by the subject of the speech is enough to make the blogger's speech commercial for purposes of First Amendment analysis, at least when the issue is whether the economic relationship between the blogger and the advertiser should be disclosed").

277 *See supra* note 126 and accompanying text. For example, choreographer Sorah Yang uploaded a mix by Esentrik with her video and credited the musician in the caption, but the audio tag reads "original sound–Sorah Yang." *See* Sorah Yang (@sorahyangofficial), TikTok (Dec. 21, 2022), https://www.tiktok.com/@sorahyangofficial/video/7179818536263535914?q=sorahyangofficial&t=1676062490869 [https://perma.cc/PXA4-QFHW].

the use is not credited, the platform's internal system will not be able to account for the use in the royalty calculation. Hopefully, the blanket compulsory license would discourage or even eliminate the need for third-party uploads of copyrighted material because all songs and all portions of songs will be freely available through the app, and users will be incentivized to only use tracks that are properly tagged. This problem could also be mitigated by improving metadata contained within audio files.[278]

Finally, an alternative to the SLC could be a new private collective rights organization (CRO) similar to the PROs.[279] This is inadvisable because a singular CRO that is not managed in some part by the government would create significant antitrust concerns, especially because it would be the only CRO of its kind to administer sync licenses.[280] The PROs might advocate for themselves to administer the UGC sync licenses, but this is again inadvisable because it would only add to their sustained, concentrated market power.[281]

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278 *See* Paul Resnikoff, *Sound Credit Releases Version 6 – A 'New Standard for Transferring Music' Aims to Resolve the Metadata Crisis*, Digit. Music News (Apr. 13, 2023), https://www.digitalmusicnews.com/2023/04/13/sound-credit-version-6 [https://perma.cc/MVX8-ZHDY] (covering innovations in metadata collection and noting that "[t]he music industry estimates that over $1.4 billion of unclaimed royalties are left on the table every single year" due to a "missing focus on metadata infrastructure").

279 *See supra* note 50 and accompanying text. For an articulation of this proposal, see Kate McCellan, *Social Media, Synchronization and Simplifying Licenses Online*, USC Spotlight (2021), https://www.uscspotlight.com/social-media-synchronization-and-simplifying-licenses-online [https://perma.cc/RFK6-8C4P] (arguing that a CRO for sync licensing on social media would give rightsholders more negotiating power and lower transaction costs).

280 The two largest PROs, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), represent about 90% of the music market in the United States, and have been operating under antitrust consent decrees since 1941. *See* Makan Delrahim, Assistant Att'y Gen., Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees, 1–2 (Jan. 15, 2021), https://www.justice.gov/atr/page/file/1355391/dl?inline [https://perma.cc/TQC5-PKYY]. The DOJ recently investigated whether the consent decrees continue to be necessary to protect competition and declined to lift or modify the decrees. *See* Ed Christman, *DOJ Ends Consent Decree Review Without Action*, Billboard (Jan. 15, 2021), https://www.billboard.com/pro/doj-consent-decree-review-ends-no-action [https://perma.cc/J3P9-RW36]. There are two smaller PROs—SESAC, Inc. (SESAC), and Global Music Rights (GMR), that do not operate under consent decrees. *See* U.S. Copyright Office, *supra* note 52.

281 *See* Priest, *supra* note 255, at 20 ("An entity that represents the majority of desirable (and theoretically competing) songs can engage in monopoly pricing. This is especially true regarding the collective blanket licensing model, in which members empower the collective to bundle works and set the bundle's price."). The continued necessity of PROs in the digital age has been called into question. For an analysis of this discussion, see *id.*

B. Supporting the Balance of Copyright

One of the prevailing justifications for compulsory licenses and collective license management is that they lower transaction costs.[282] In the sync licensing context, it is time-consuming and costly to locate potentially numerous rightsholders and negotiate a license, which can be fatal in a content medium where trends are lightning fast, relevancy is key, and the costs of creation are otherwise cheap.[283] Some have argued that private ordering is the most efficient way to deal with transaction costs, but compulsory licensing is more than efficient—it can also be a powerful tool to achieve copyright policy goals.[284] With a new compulsory license for sync, Congress could similarly adjust the tradeoffs between incentives and access to promote the dissemination of works to the public for secondary uses while still encouraging artists to create with a guaranteed royalty.[285]

One way to understand the creation of the § 115 compulsory license is that Congress wanted to ensure that copyright owners were still compensated (and incentivized to create) while permitting technological growth and innovation.[286] This policy-oriented effect was enhanced by the statutory rate-setting factors used by the CRB: access, fair return for the creator, the relative creative contributions of the parties and their potential to stimulate more expression, and industry practice.[287]

Ideally, the statutory rate would be keyed to policy-driven factors because this would better accomplish the goal of this reform.[288] However, given the recent legislative change under the MMA to the willing buyer/willing seller standard for all statutory music rate-setting, it seems unlikely that the policy-driven standard would be politically salient.[289] While less beneficial to this proposal's specific aims, keying

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[282] *See* Priest, *supra* note 255, at 2 ("Historically, collective copyright management has been valuable for both copyright owners and users of copyrighted works. The primary advantage is reduced transaction costs."); Victor, *supra* note 11, at 937 ("[T]he conventional account of compulsory licensing . . . is not tied to rebalancing the incentives/access tradeoff but instead focused only on remediating transaction costs.").

[283] *See supra* Sections I.A, I.B; *supra* notes 85–90; Victor, *supra* note 11, at 928.

[284] *See* Victor, *supra* note 11, at 929–30, 937.

[285] *See id.* at 921.

[286] *See id.* at 941; Priest, *supra* note 255, at 15–16.

[287] *See* Victor, *supra* note 11, at 943–44 (quoting the policy criteria set out in § 801(b) of the Copyright Act of 1976); 17 U.S.C. § 801(b)(1) (2012) (amended 2018).

[288] *See* Victor, *supra* note 11, at 920–21. Policymakers might also be interested in an additional compulsory license for commercial UGC sync keyed to a different (presumably higher) standard, which could address lingering transaction costs and present another arena in which to compromise.

[289] *See id.* at 948, 948–71 (analyzing recent legislation and decisions about compulsory license rate-setting to conclude that they represent a shift in focus away from policy and

the compulsory license to the willing buyer/willing seller standard will likely make it more palatable to rightsholders and critics of compulsory licenses, and thus more achievable.[290] Some criticize existing compulsory licenses for undercompensating recording artists, but the latest CRB ruling on the willing buyer/willing seller standard will result in a nearly forty-four percent increase in mechanical royalties from streaming platforms.[291] Moreover, this criticism should be redirected away from the compulsory license and instead toward the ways in which royalties are distributed among artists by the music industry.[292]

Grounding sync rights in a compulsory license would also help prevent the curtailment of fair use, a bedrock doctrine that protects the access side of the copyright scale.[293] Defining the scope of copyright for synchronization licenses reduces the risk of the doctrinal feedback resulting in expansion of the scope of copyright by making the gray areas less gray.[294] Some might argue that this licensing model supplants fair use because it dispenses with noninfringing acts, creating a licensing market that does not already—and should not—exist. But the current private ordering regime already does so without supervision by public entities tasked with review of public law.[295] Alternatively, a statutory

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towards a "market-mimicking" royalty rate, showing a belief that these licenses should function primarily to remedy transaction costs). The new standard has already been critiqued as furthering an exclusively transaction-cost goal, which "prevents the regime from also serving the policy goals at the heart of American copyright law." *Id.* at 961, 970–71.

290 *See supra* notes 261–63 and accompanying text.

291 *See* Victor, *supra* note 11, at 970–71; Dylan Smith, *13 Months Later, the CRB Has Officially Finalized Its Phonorecords III Determination*, Digit. Music News (Aug. 14, 2023), https://www.digitalmusicnews.com/2023/08/14/phonorecords-iii-final-decision [https://perma.cc/ES3Y-HUKX] (noting that the CRB has finalized its latest decision to increase the royalty rate for on-demand streaming by 43.8%). For criticism of this increase, see Victor, *supra* note 11, at 970–71 (arguing that "the overall higher rates—and the costs they impose on distributors—will likely be borne by consumers").

292 *See* Victor, *supra* note 11, at 980–81; Tang, *supra* note 17, at 793–94 ("[G]enerally, royalties are paid directly to music publishers and record labels with no concomitant procedure for accounting to songwriters or musicians."); Ben Sisario, *Musicians Say Streaming Doesn't Pay. Can the Industry Change?*, N.Y. Times (May 7, 2021), https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html [https://perma.cc/WQ6C-4F75] ("Major record labels, after contracting painfully for much of the 2000s, are now posting huge profits. Yet not enough of streaming's bounty has made its way to musicians, the activists say, and the major platforms' model tends to over-reward stars at the expense of everybody else.").

293 *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Harms Free Speech and How Copying Serves It*, 114 Yale L. J. 535, 589 (2004) (advocating for fixing fair use, and raising concerns about licensing fair use for free speech purposes); *supra* Section I.A.

294 *See supra* Section II.A.1; Tang, *supra* note 17, at 776–82.

295 *See* Tushnet, *supra* note 231, at 1482–83 ("The [private] always-license model inevitably entails pervasive suppression of expression, further threats to privacy and to the individual and social benefits of noncommercialized communities, and constrained competition. Fair use, in contrast, supports independence and variety in individual works and also in the

exception for dominantly noncommercial UGC sync would do more to promote access,[296] but such a proposal is unlikely to be seriously considered by Congress because it will severely disadvantage incumbent rightsholders.[297] Consequently, full discussion of this option is outside the scope of this Note.

Additionally, even if the major parties fail to renew their licenses, user creativity would be protected by the compulsory license because rightsholders would not be able to withhold permission for noncommercial UGC sync as they may now.[298] As illustrated by UMG's withdrawal from TikTok, the possibility that rightsholders will exercise this option is very real.[299] If this new provision is constructed similarly to the MMA, it would also permit parties to contract around the statutory license.[300] This could weaken the policy impact of the license. But private ordering takes place "in the shadow of copyright": Though copyright law might be just one constraint in a complex private negotiation, it could influence the negotiations by setting the bargaining positions and creating incentives for the parties to reach efficient deals that support innovation.[301] Thus, an imperfect statutory scheme can still represent the public interest in the contest between rightsholders and innovators.[302]

C. Comparing Today to the Pre-MMA Landscape

The obvious commonality between sync licensing today and the pre-MMA digital streaming conversation is the explosive application of rights on a new, much larger scale due to technological advancement

intermediaries and communities that support them."); Tang, *supra* note 17, at 756–57, 774–75 ("[T]he use of private contracting gives copyright owners . . . power to create new rules that govern how millions of people share copyrighted content—without any need to resort to the legislative process.").

296 *See, e.g.*, Chik, *supra* note 263, at 270–72 (proposing two options for statutory limitations on copyright protection that would apply in the UGC context); Peter K. Yu, *Increased Copyright Flexibilities for User-Generated Creativity*, *in* Reforming Intellectual Property 304, 309–10 (Gustavo Ghidini & Valeria Falce, eds., 2022) (discussing a similar system currently in place in Canada, and arguing that increased flexibility for UGC using copyrighted content has significant benefits and "will enable the Internet and other new communication technologies to realize its immense potential for political, social, economic and cultural developments").

297 *See* Loren, *supra* note 76, at 577–78 (describing a prominent narrative in the evolution of copyright law as protecting incumbents and burdening newcomers).

298 *See supra* note 85 and accompanying text.

299 *See supra* note 15 and accompanying text.

300 *See* Passman, *supra* note 48, at 239–41 (noting that the MMA still permits parties to enter into voluntary licensing agreements).

301 Peter DiCola & David Touve, *Licensing in the Shadow of Copyright*, 17 Stan. Tech. L. Rev. 397, 457–59 (2014).

302 *See id.*

without prior regulation.[303] A comparison of the conditions that led to the enactment of the MMA suggests that the state of sync licensing today is another moment in which congressional intervention would be helpful and appropriate. TikTok is driving this need for change because it has enabled an explosion of new uses and users for synchronized video and its subsequent complementary relationship with the music industry. Sync licenses today appear to be moving away from song-by-song or use-by-use licenses towards more efficient blanket licenses, as mechanical licenses did because of the MMA.[304] Similarly, before the MMA, there was general confusion about whether either or both the public performance right or the reproduction right of a musical composition was implicated by a digital stream.[305] Today, though there is no apparent active discussion about whether and when sync rights are implicated by UGC, there is also no direct guidance from courts or Congress.[306]

However, there are several significant differences that deserve consideration. Pre-MMA, the conflict over mechanical licenses was due in large part to concern from the music industry that streaming services would significantly reduce performance and mechanical royalties by replacing album sales and traditional performance licenses.[307] Here, while synchronization rights for movies, TV, and commercials do comprise a portion of music industry revenue, there is little chance that UGC on TikTok and other similar platforms will replace the now-booming sync revenue flow from streaming platforms such as Netflix, Hulu, and HBO Max. Rather than protecting preexisting revenue streams, today's private ordering appears to be a preemptive attempt to control a new market and establish security for both rightsholders and platforms.[308] The MMA was also in part a response to the uncertainty rightsholders and digital streaming services faced concerning liability, accountability, and payment,[309] but today the major actors have achieved that for

303 *See supra* notes 57–64 and accompanying text; PASSMAN, *supra* note 48, at 239–41 (explaining that the MMA's compulsory license was created in response to the inability of the nascent digital streaming platforms to find and locate rightsholders to make royalty payments).

304 *See supra* notes 61–64 and accompanying text.

305 Priest, *supra* note 255, at 11.

306 *See supra* Section II.A.2.

307 Priest, *supra* note 255, at 13.

308 *Cf.* Loren, *supra* note 76, at 565 (noting the history of congressional efforts to protect copyright owners' "existing business models" and their "potential for a healthy revenue stream").

309 Priest, *supra* note 255, at 13.

themselves with private licenses.[310] Significantly, users and independent artists are not part of that conversation.[311]

One criticism of the MMA is failure to achieve parity in treatment in the music industry for musical compositions and sound recordings.[312] Importantly, this proposal seeks to treat sync licenses for musical works and sound recordings the same by offering the same protections and charging the same statutory rate. Additionally, the blanket license will ensure that users have access to works that are currently not privately licensed by TikTok, and that there is parity between artists that are unsigned or on smaller labels and publishers and those who are with the majors.[313]

Perhaps the most significant hurdle to enacting a blanket, compulsory licensing regime is that it would require legislative action and intervention in private ordering.[314] As of this writing, with the exception of UMG, most rightsholders appear to be in the process of renegotiating licenses with TikTok,[315] but there is not the same pressure for change from artists, nor such significant conflict and litigation between the contracting parties because the private licenses have bridged the gap. For example, prior to the enactment of the MMA, the Harry Fox Agency failed to keep up with large-scale administration of the bulk mechanical license for streaming services, and a majority of royalties were not distributed.[316] For comparative purposes, it would be useful to know if or on what scale any royalties due to rightsholders are unpaid because of alleged synchronization infringement. However, it seems sufficient to note that the situation today appears to be more cooperative than prior to the MMA.[317] It will likely take either significant momentum

310 *See supra* note 15 and accompanying text.

311 *See supra* notes 234–35 and accompanying text.

312 Loren, *supra* note 69, at 2541–43 (explaining that for digital interactive streaming, the § 115 compulsory license covers musical compositions but not sound recordings; and that for digital noninteractive streaming, the musical composition requires permission for public performance, but sound recordings are subject to the § 114 statutory license).

313 *Cf.* McCellan, *supra* note 279 (describing how "copyright holders with large catalogs, like Sony or Universal, have an easier time negotiating with tech companies" while "independent songwriters and artists lack the collective bargaining power to reach equivalent deals for use of their music.").

314 *See* Tushnet, *supra* note 231, at 1483 n.138 (discussing the viability of a "license-everything" world).

315 *See* Andrew Hutchinson, *TikTok Announces New Music Licensing Agreement with Warner Music*, Soc. Media Today (July 18, 2023), https://www.socialmediatoday.com/news/tiktok-announces-new-music-licensing-agreement-warner-music/688322 [https://perma.cc/5U75-EDTL] (announcing TikTok's new partnership with Warner Music Group, but noting that TikTok has not yet reached an agreement with other labels); *supra* note 15 and accompanying text.

316 *See* Priest, *supra* note 255, at 12–13.

317 *See, e.g.*, Dredge, *supra* note 128 (noting that TikTok's head of global music, Ole Obermann, was formerly chief digital officer at Warner Music Group and was diplomatic

or an escalation in the tension between rightsholders and platforms to push Congress to act. But new technologies have produced this kind of action before, and policymakers should notice this opportunity to align copyright practice with its purpose.[318]

Conclusion

Copyright law has always been dynamic and evolving, but it does not always keep up with innovation. TikTok's unique application of integrated music and video is the type of innovation of which copyright law should take notice. Though there are significant differences between today's dialogue and that which led to the enactment of the MMA, the MMA is in large part a compromise. This Note has proposed another compromise—one that seeks to build on the successes and shortcomings of prior responses to technological innovation and preserve the balance of copyright. While this is certainly not a perfect solution, the blanket compulsory license for noncommercial UGC sync would help preserve creativity-generating public access to musical works and prevent private licenses from further narrowing fair use. Future scholarship might further contemplate whether preempting or simply relying on fair use in the noncommercial UGC context raises First Amendment concerns, as social media has come to play an important role in cultural, social, and political dialogue.[319] Analyzing the rapid expansion of sync licensing in light of the policy justifications for copyright suggests that private ordering, in which the public has no representative, should not be permitted to further expand the scope of exclusive rights and unduly restrict the very creativity that copyright is meant to encourage and protect.

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when speaking about licensing); Cirisano, *supra* note 249 (quoting Sony Music Entertainment president, global digital business and U.S. sales Dennis Kooker as saying, "TikTok is a leader in this space and we are pleased to be partnering with them to drive music discovery, expand opportunities for creativity and support artist careers."). *But see* Murray Stassen, *TikTok's Bust-Up with the Major Music Companies Is Starting to Simmer.*, Music Bus. Worldwide (Feb. 16, 2023), https://www.musicbusinessworldwide.com/tiktoks-bust-up-the-major-music-companies-simmer [https://perma.cc/Z292-KNY8] (covering the Australian Recording Industry Association's negative reaction to TikTok's test decision to temporarily limit user access to some music in Australia).

318 *See supra* Section I.B.1.

319 *Cf.* Adler & Fromer, *supra* note 151, at 542–49 (discussing the limitations of current copyright law in protecting "meme culture" and its accompanying free speech values); Danwill D. Schwender, *The Copyright Conflict Between Musicians and Political Campaigns Spins Around Again*, 35 Am. Music 490, 494 (2017) (arguing that "[c]opyright remains musicians' best vehicle to control how their songs are used" in political campaigns); Tushnet, *supra* note 293.