

NOTE

DUET YOUR JOINT WORK: HOW SONGWRITERS OPEN THEMSELVES TO JOINT AUTHORSHIP WITH “OPEN VERSE CHALLENGES” ON TIKTOK

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The digital world has created new and exciting challenges for the world of copyright law. TikTok’s impact on the music industry is profound, especially in terms of music ownership and licensing. The application’s duet feature has resulted in a popular trend called the “open verse challenge,” where artists present their music to the online community and invite other artists to add in their own verse. This innovative way to collaborate on music composition leaves open questions regarding copyright ownership of these sounds on TikTok.

This Note analyzes the methods and circumstances of these duets, discussing the mechanism for how these duets come to be. Many of these duets include an intention to collaborate on a shared song from both the original artist and the duetters. Under the Childress test, these duets should be considered joint works, which has important implications for how royalties should be distributed.

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INTRODUCTION

In 2022, TikTok was the most downloaded mobile application for the third consecutive year, with 672 million people downloading it onto their phones this past year alone.¹ TikTok has quickly become a household name since Byte Dance first offered the application in the United States in 2018.² Worldwide, the application has approximately

1. John Koetsier, *10 Most Downloaded Apps of 2022: Facebook Down, Spotify Up, TikTok Stable, CapCut Keeps Growing*, FORBES (Jan. 4, 2023, 12:25 PM) [hereinafter Koetsier, *Most Downloaded Apps 2022*], <https://www.forbes.com/sites/johnkoetsier/2023/01/04/top-10-most-downloaded-apps-of-2022-facebook-down-spotify-up-tiktok-stable-capcut-keeps-growing> [<https://perma.cc/85D2-33AP>]; John Koetsier, *Top 10 Most Downloaded Apps and Games of 2021: TikTok, Telegram Big Winners*, FORBES (Dec. 27, 2021, 2:14 PM), <https://www.forbes.com/sites/johnkoetsier/2021/12/27/top-10-most-downloaded-apps-and-games-of-2021-tiktok-telegram-big-winners> [<https://perma.cc/Y9EP-ZNNH>]; John Koetsier, *Here Are the 10 Most Downloaded Apps of 2020*, FORBES (Jan. 7, 2021, 12:37 PM), <https://www.forbes.com/sites/johnkoetsier/2021/01/07/here-are-the-10-most-downloaded-apps-of-2020> [<https://perma.cc/4W3Z-KLND>]. There were ninety-nine million downloads of TikTok in the United States alone in 2022. Koetsier, *Most Downloaded Apps 2022*, *supra*.

2. PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., R46543, *TIKTOK: TECHNOLOGY OVERVIEW AND ISSUES 1* (2023).

1 billion monthly active users.³ Much of the content on TikTok consists of user-created videos that incorporate music.⁴ TikTok's reliance on the use of music presents important questions about intellectual property.⁵

For musicians, TikTok could be a place where they gain a following that earns them a record deal.⁶ However, the application has become a minefield for intellectual property issues, from the posting of stolen works to the adaptation of copyrighted works, all while TikTok has become a major force in the music industry.⁷ Many record labels now use TikTok to introduce new music and consider engagement with the music on the platform when making business decisions.⁸

TikTok's main feature is the "For You" page, a feed built through a recommendation engine that employs artificial intelligence and data mining.⁹ Sounds are audio, generated by users or made available by

3. *Id.*

4. See Ann Potter Gleason, *Copyright Owners' Love/Hate Relationship with TikTok and Instagram Raises Legal Issues*, 10 NAT'L L. REV. 241 (Aug. 28, 2020), <https://www.natlawreview.com/article/copyright-owners-lovehate-relationship-tiktok-and-instagram-raises-legal-issues> [<https://perma.cc/LV8Q-VEXA>] (citing to Anna Nicolaou, *Music Companies Threaten to Sue TikTok Over Copyright*, FIN. TIMES (Apr. 4, 2020)), <https://www.ft.com/content/1b3b78ea-32a3-4237-8b79-3595820eeb63> [<https://perma.cc/P35E-CT4D>] (estimating that fifty percent of the music publishing market is unlicensed with TikTok as of April 2020); Fakhira Meshara Salsabila, Ranti Fauza Mayana & Laina Rafianti, *Copyright Commercialization of Songs Uploaded in TikTok Application Without the Creator's Permission*, 5 JURNAL SAINS SOSIO HUMANIORA 213, 214 (2021) (discussing the use of songs on TikTok).

5. See Gleason, *supra* note 4 (discussing the potential legal consequences of users uploading their songs to TikTok and other users' uses of that music).

6. See Dale Kawashima, *NMPA CEO David Israelite Discusses Music Royalties During the Pandemic, the Latest on Copyright Royalty Board Hearings, and the Growth of TikTok and Other Income Streams*, SONGWRITER UNIVERSE (Jan. 26, 2022), <https://www.songwriteruniverse.com/david-israelite-nmpa-interview-2022.htm> [<https://perma.cc/NED3-7VYJ>] (explaining that streaming has become more important since the COVID-19 pandemic shut down revenue for touring artists and people working in the concert industry); see also Russ Crupnick, *Music Scores a Gold Record on the Social Media Charts*, MUSIC WATCH (Aug. 6, 2018), <https://musicwatchinc.com/blog/music-scores-a-gold-record-on-the-social-media-charts> [<https://perma.cc/T2LB-G44E>] (determining that nine out of ten social media users participate in music related social media activity).

7. Salsabila et al., *supra* note 4, at 218 (explaining that using copyrighted works without rights or the copyright holder's permission can lead to imprisonment and/or fines); Kawashima, *supra* note 6 (stating that the rise of TikTok has led many record labels and artists to use it to introduce new music).

8. See Kawashima, *supra* note 6 (expressing that record labels and artists consider TikTok activity in decision making).

9. *Id.*

TikTok, which creators may select to play in their videos.¹⁰ As TikTok users increasingly interact with sounds, those sounds are increasingly recommended to other users through their “For You” page.¹¹ Users will then not only utilize those sounds for entertainment, but also include them in monetized videos that advertise products.¹² The opportunities to earn money online have led to the proliferation of “creators,” people who post on TikTok regularly. The viral use of a song¹³ across the platform is advantageous to the song’s authors, whether that use was licensed or not.¹⁴ However, copyright owners still want fair payment for the use of their music on TikTok.¹⁵ In response to the urging of many in the music industry, TikTok has agreed to a wide variety of licensing agreements wherein TikTok pays for the music that is available to its users.¹⁶ TikTok negotiated these agreements directly with music publishers and record labels.¹⁷

Another Tiktok feature is the duet feature, which allows a creator to place their video next to a preexisting video and add their own sound.¹⁸

10. *The Importance of Sounds*, TIKTOK, <https://www.tiktok.com/creators/creator-portal/en-us/tiktok-creation-essentials/the-importance-of-sounds> [https://perma.cc/R7KY-GYC7].

11. See Salsabila et al., *supra* note 4, at 215 (explaining how TikTok spreads songs by way of content recommendation to its users).

12. See *id.* (describing product monetization as ranging from brands utilizing their own TikTok accounts to post videos to “influencers” using products in their own content as sponsored content).

13. The term “song” will be used to describe the combination of a sound recording and its underlying musical composition.

14. See Salsabila et al., *supra* note 4, at 215 (explaining that using a sound will aid the artist in gaining exposure, if not direct monetary earnings, and exposure tends to lead to more streaming revenue).

15. Max Walters, *TikTok: Licensing Floodgates to Open, Say Lawyers*, MANAGING INTELL. PROP. (Aug. 6, 2020), <https://www.managingip.com/article/2a5cx783ao223ef8j3hts/tiktok-licensing-floodgates-to-open-say-lawyers> [https://perma.cc/53TJ-8C7B].

16. *Id.*; see David Israelite, *What the Metaverse Means for Music Creators (Guest Column)*, BILLBOARD (Nov. 30, 2021), <https://www.billboard.com/pro/metaverse-music-creators-guest-column-nmpa> [https://perma.cc/DKY5-T5BA] (highlighting that music creators have been pushing not only TikTok to pay them fairly for their music, but also other companies, such as Roblox).

17. Kawashima, *supra* note 6; see also *infra* notes 64–97 and accompanying text (discussing the ownership of sound recordings and musical works).

18. Emily Blackwood, *How to Duet on TikTok, and 5 TikTok Duet Ideas*, BACKLIGHT (June 22, 2021), <https://backlightblog.com/how-to-duet-on-tiktok> [https://perma.cc/W8VT-5LXU].

Creators choose to enable or disable duets when posting videos.¹⁹ If enabled, other users may then duet the video.²⁰ This action results in the original and new videos being displayed side-by-side on the screen, with the option to maintain or mute the original video's sound.²¹ "Open verse challenges" are when a creator posts approximately one minute of their recorded song and invites other creators to duet the song and add their own verse.²² The original creator will post a clip of their song, part of which does not have lyrics yet, and creators will add their own lyrics over the instrumental portion of the sound clip.²³ The resulting sound clip combines the sounds of both videos.²⁴ This final sound clip, and who owns the exclusive rights to it, matters because creators can earn a significant amount of money if it goes viral.²⁵

This Note will examine TikTok's duet feature and the common practice of musical creators inviting other musicians to duet their song and combine it with their own contribution. Part I provides background information about TikTok and explains the mechanics of duets. Additionally, Part I discusses the music industry's standard practices for licensing and sampling, and the common theme of borrowing within music composition and recording. Part II outlines the rules of copyright law on the creation of joint authorship and its

19. *Id.* (asserting that disabling duets allows creators more control over their content and how it is used).

20. *Id.*; see also *Feature Highlight: New Layouts for Duet*, TIKTOK [hereinafter *New Layouts for Duet*], <https://newsroom.tiktok.com/en-us/feature-highlight-new-layouts-for-duet> [<https://perma.cc/5BSJ-DRHJ>] (last updated Oct. 2, 2022) (explaining how to create a duet on TikTok). TikTok duets can also be stitched, which allows yet another user to play a part of the duet and then use the whole screen to reply or interact with the duet. *Stitch*, TIKTOK, <https://support.tiktok.com/en/using-tiktok/creating-videos/stitch> [<https://perma.cc/V3CR-PAZZ>].

21. Blackwood, *supra* note 18; see also *New Layouts for Duet*, *supra* note 20 (explaining that users have four layout options for duets: a left and right layout, a top and bottom layout, a react layout, and a three screen layout).

22. Mustafa Gatollari, *What Is the Open Verse Challenge that Everyone Seems to Be Doing on TikTok?*, DISTRACTIFY (May 16, 2022, 1:48 PM), <https://www.distractify.com/p/open-verse-challenge-tiktok> [<https://perma.cc/7ERC-DDKL>].

23. *Id.* The result is often similar to that of a rap artist being featured on another artist's song; however, the sound resulting from a duet contains significantly more content from the duetter than a song would contain from a featured author. *Id.*

24. *Id.* These sounds can then be overlaid over other creators' videos. *Id.*

25. See Georgina Smith, *Who Is Ktlyn Raps on TikTok? Rapper Goes Viral with Russ 'Handsome' Remix*, DEXERTO (Mar. 14, 2022, 10:38 AM), <https://www.dexerto.com/entertainment/who-is-ktlyn-raps-on-tiktok-1783039> [<https://perma.cc/7XRS-R38C>] (discussing the near immediate success of Ktlyn due to her open verse addition to Russ's song).

legal consequences. It also discusses derivative works and their legal impact on joint authorship. Part III argues that open verse challenges and the ensuing works may result in joint works in certain factual situations, and that those that do should be subject to the laws of joint authorship to protect creators' rights in their works. Finally, Part IV concludes that the sound recordings and the underlying composition of the open verse challenges on TikTok should be considered joint works, rather than derivative works, which gives the creators who participate in the open verse challenges more freedom and rights.

I. TIKTOK DUETS: OPEN VERSE CHALLENGES

Since TikTok's release in the United States in 2018, it has risen to significant prominence and has, in turn, impacted cultural trends due to its use by celebrities, fashion designers, brands and companies, musicians, and influencers, as well as its ubiquity among young people.²⁶ "Trends" are when a certain format, dance, or joke is used for a video by multiple people, who often pair it with "sounds."²⁷ "Sounds" are audio clips that users may overlay over a video that they upload to the application.²⁸ These sounds are often clips of songs that creators synchronize with their videos by speeding up or slowing down the song.²⁹ The prevalence of music use on social media has resulted

26. 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/2MTE-SFUT>] (explaining that American Eagle chose to partner with a rising Gen Z TikTok star over known celebrities); Kawashima, *supra* note 6 (stating that TikTok has a major influence on the music industry, including music labels using the application to introduce new music and artists).

27. See, e.g., Waiyee Yip, *A TikToker's Unfortunate Hip Injury Has Gone Viral and Inspired Thousands of Hilarious TikTok Duets*, INSIDER (Apr. 18, 2022, 4:13 AM), <https://www.insider.com/tiktokers-injury-goes-viral-inspires-hilarious-tiktok-duets-2022-4> [<https://perma.cc/ERS3-GU3M>] (describing an example of a trending sound on TikTok). Trends a user sees on TikTok can also vary greatly depending on the content that TikTok shows the user based on the user's perceived likes and dislikes as calculated by TikTok's algorithm. See Liz Sommer, *The Sides of TikTok*, STAYHIP (June 23, 2020), <https://stayhip.com/news/the-sides-of-tiktok> [<https://perma.cc/2RTU-9QCE>] (discussing the various "sides" of TikTok and the significance that users and creators alike attach to their placement in each of those sides).

28. Seabrook, *supra* note 26.

29. *Id.* Speeding up sounds can be used for comedic effect or just to fit more of the song into a short TikTok to convey the TikTok's meaning. Sarah Kaufman, *TikTok Users Are Demanding that Their Favorite Musicians Release Sped-Up Songs*, NBC NEWS (Apr. 22, 2023, 9:28 AM), <https://www.nbcnews.com/pop-culture/viral/tiktok-sped-up-fast-songs-sounds-rcna79256> [<https://perma.cc/J48X-R8M3>].

in certain songs rocketing to viral success overnight through their connection to a trend.³⁰ In fact, one of the early songs to reach viral success, Lil Nas X's smash hit "Old Town Road," and its subsequent remix with Billy Ray Cyrus, was a turning point for music industry skeptics.³¹ Now, because TikTok can be a strong indicator of success of music on streaming platforms, such as Spotify or Apple Music, record labels often test a song's potential by releasing a snippet on TikTok.³² Not only do new songs reach popularity in record time through TikTok, but the application has also rocketed songs that have been off the charts for a long time, some for nearly forty years, back into top charts.³³

30. See Seabrook, *supra* note 26 (following an aspiring TikTok star who demonstrates that a video or sound's viral success does not come overnight but does happen very suddenly and sometimes without much reason).

31. See *id.* (laying out the ways that Lil Nas X was able to harness the power of social media to grow a massive fan base and convert that into success in the music industry).

32. See *id.* (noting that more than seventy new artists originating from TikTok signed contracts with record labels in 2020 alone). With the shift in the music industry away from CDs or vinyl to streaming, success on streaming platforms is vital. Oscar Heanue, *Steaming Services Are the Future of the Music Industry. But They're Leaving Musicians Behind*, ONLABOR (Jan. 25, 2022), <https://onlabor.org/streaming-services-are-the-future-of-the-music-industry-but-theyre-leaving-musicians-behind> [<https://perma.cc/R5YJ-9A3Q>]. About sixty-two percent of total music industry revenue comes from streaming services like Spotify, and the shift to streaming has shown an increase in the music industry's profits for the first time since the drop in income in the early 2010s. *Id.* While this shift is great for the music industry, the musicians themselves get very little of the profits, which is why it is incredibly important for these musicians to have access to ownership of the works they create online, which could generate income for them. *Id.*

33. Seabrook, *supra* note 26; see Zoe Haylock, *The Best Songs TikTok Has Rediscovered*, VULTURE, <https://www.vulture.com/article/the-best-songs-made-famous-again-by-tiktok-users.html> [<https://perma.cc/F8ND-3KXL>] (last updated Apr. 16, 2020) (listing a variety of songs that have returned to top charts because users on TikTok have begun to use them in their videos). Some of these songs have Netflix and its counterparts to thank for their rebound success among younger audiences. *Id.* Often subscribers to these video streaming services will become attached to a song that is highlighted in a popular television show, such as *Stranger Things* or *Wednesday*, and they will create trends for others to follow on TikTok. Alyssa Mercante, *Netflix Wednesday TikToks Turned the Wrong Old Song into a New Radio Hit*, KOTAKU (Dec. 21, 2022), <https://kotaku.com/jenna-ortega-wednesday-dance-netflix-tiktok-lady-gaga-1849919467> [<https://perma.cc/8DTF-ADW8>]. These trends result in a wider net of creators using the song than just those who watch those shows. *Id.*

The TikTok duet feature allows users to respond to, collaborate with, and criticize each other.³⁴ Duets are powerful tools for creating content on the platform.³⁵ Creators often virtually connect to create compositions, and even scenes, where the duets interact with each other to create a dialogue.³⁶ Open verse challenges allow record labels to promote music, and they aid musicians in collaborating on unfinished work.³⁷ The mechanics of an open verse challenge are relatively simple.³⁸ The original creator posts an almost finished song with the lyrics missing for one verse, usually the bridge.³⁹ Other creators then duet the original video, adding in their own lyrics and melodies that usually play off the song's themes and match its genre to

34. Blackwood, *supra* note 18; *New Layouts for Duet*, *supra* note 20. It is important to note that TikTok's influence on music popularity does not operate in a bubble; often, TikTok amplifies songs' popularity to a much higher degree than the music would have reached without the instantaneousness of TikTok's algorithm pushing certain sounds and songs to its users. See Mercante, *supra* note 33 (discussing how a trend to replicate a dance from the popular Netflix show, *Wednesday*, caused a Lady Gaga song to become popular once again, despite the fact that the song in the show was actually by The Cramps).

35. Blackwood, *supra* note 18.

36. Seabrook, *supra* note 26. This type of interaction has resulted in offline success for some, most notably Abigail Barlow and Emily Bear, who won a Grammy for their *Unofficial Bridgerton Musical*, which started through a TikTok collaboration and grew partially due to others duetting their songs and singing along. Nicole Fallert, *Meet the Women Behind the TikTok "Bridgerton" Musical Who've Now Made Grammy History*, BUZZFEED NEWS (Dec. 17, 2021, 11:52 AM), <https://www.buzzfeednews.com/article/nicolefallert/bridgerton-musical-grammy-tiktok-duets> [<https://perma.cc/HLQ4-HB4G>]. Other musicals like this have been created through TikTok, including one based on the Disney movie *Ratatouille*. *Id.* However, Barlow and Bear ran into trouble due to their unlicensed use of Netflix's intellectual property from *Bridgerton* when they went too far by charging for tickets to a performance of the musical at the Kennedy Center, an action which Netflix specifically told the creators they were not sanctioned to do. See Logan Culwell-Block, *Netflix Settles Lawsuit over Abigail Barlow and Emily Bear's Unofficial Bridgerton Musical*, PLAYBILL (Sept. 26, 2022), <https://playbill.com/article/netflix-settles-lawsuit-over-abigail-barlow-and-emily-bears-unofficial-bridgerton-musical> [<https://perma.cc/H5SU-CAGE>] (discussing the settlement between the creators and Netflix).

37. Seabrook, *supra* note 26 (opining that allowing TikTok creators to do what is essentially free labor to promote a song by duetting it lets the record labels capitalize off of creators' investment in the song without having to invest much themselves). Some artists offer cash prizes to those who contribute and add the artist's favorite duet. Gatollari, *supra* note 22.

38. Gatollari, *supra* note 22.

39. *Id.* (following the typical format for a "feature" on a typical song).

create a cohesive sound.⁴⁰ Some creators instead opt to use the duet feature to add in monologues from TV shows or movies rather than complete the song with original lyrics.⁴¹ There is no clear mechanism for crediting the song used, and creators credit as a courtesy, not because it is required by TikTok.⁴²

Some of these open verse challenges have become career-making duets.⁴³ For example, Russ, a popular rapper, posted an open verse version of his song *Handsome*, which was met by a flurry of duets.⁴⁴ One duetter caught Russ's attention: Ktlyn, a rapper with nearly two million followers on TikTok, whose open verse duet now has nearly three million likes and twenty-two million views.⁴⁵ The pair released the new version of Russ's song *Handsome*, with Ktlyn's contributed verse, for purchase and streaming on traditional music platforms.⁴⁶ This duetted version became a smash hit overnight and continued to gain popularity once it migrated from TikTok over to traditional music streaming platforms.⁴⁷

Russ is savvier than most artists when it comes to using social media to gain popularity.⁴⁸ *Handsome* is not the only open verse he has

40. *Id.* The range of quality in the duets tend to vary based on the creator that stitches the open verse challenge. *Id.*

41. *Id.* Maria Mae's duet in which she duetted Lauren Spencer-Smith's "Finger's Crossed" with a popular monologue from *Grey's Anatomy* is a good example of this type of duet. Maria Mae (@maria.mae), TIKTOK (Apr. 9, 2022), <https://www.tiktok.com/t/ZT8NhEonN> [<https://perma.cc/A863-4LWE>] (captioning the duet "there's [eighteen] seasons of this bloody show meaning an INFINITE amount of scenes that could fit this audio").

42. Salsabila et al., *supra* note 4, at 219.

43. Smith, *supra* note 25; *see, e.g.*, Nicolle Monico, *Social Status*, SAN DIEGO MAG. (Apr. 21, 2023), https://www.sandiegomagazine.com/people/rapper-ktlyns-rise-to-fame/article_9c97f634-dfae-11ed-b12d-4f5452887ade.html [<https://perma.cc/Z7HT-HFAX>] (following a California based rapper and TikToker, Ktlyn, who has a platinum single, signed record deals, and performed before a 9,000 person crowd after an open verse challenge amassed more than two million views and garnered attention from artist Russ); Ashlee Young, *Russ Enlists TikToker as Feature Artist for Remix to 'Handsome'*, K93.7 BEAT (Mar. 10, 2022), <https://937thebeathouston.iheart.com/alternate/amp/2022-03-10-russ-enlists-tiktoker-as-feature-artist-for-remix-to-handsomer> [<https://perma.cc/S4N8-8ED7>].

44. Smith, *supra* note 25.

45. *Id.*

46. *Id.*

47. *Id.*

48. Young, *supra* note 43. Like Lil Nas X, Russ seems to have a good sense of how to use social media to his career's advantage, and he has used that knowledge to great success. *Id.*

offered; he also released *Remember (Remix)* as an open verse challenge, which resulted in the success of another artist named Hailey Knox.⁴⁹ Russ released this new single and invited other artists to contribute a verse.⁵⁰ Knox added her own take, and Russ requested for her to join an official remix.⁵¹ Russ's popularity extends beyond TikTok; his extended play was critically acclaimed, and his follow-up album features a long roster of well-known rappers and producers.⁵² This type of popularity translates to album sales; in fact, Russ's second album sold so many units in just a few days that it was in the running for a Grammy for Best Rap Album of the Year.⁵³

Russ is not the only artist who has been met with acclaim for songs that resulted from open verse challenges.⁵⁴ Stacey Ryan released her debut single "Don't Text Me When You're Drunk" as an open verse challenge; her video included the first line of the chorus of her unfinished song followed by her inviting creators to add their own

49. Shawn Grant, *Russ Drops "Remember (Remix)" with TikTok 'Open Verse Challenge' Winner Hailey Knox*, SOURCE (Jan. 24, 2022), <https://thesource.com/2022/01/24/russ-drops-remember-remix-with-tiktok-open-verse-challenge-winner-hailey-knox> [<https://perma.cc/5EHH-UEFN>].

50. *Id.*

51. *See id.* (noting that the freedom Russ enjoys as an independent artist allows him to turn around these remixes within a week, keeping the enthusiasm for his music high).

52. *Id.* An extended play is a musical release containing more tracks than a single but less than a full album. *EP's, LP's, Albums, and Mixtapes*, MARSHALL (Oct. 8, 2019), <https://marshall.com/live-for-music/moving-on-up/eps-lps-albums-and-mixtapes> [<https://perma.cc/LSB9-9Q3X>].

53. *Id.* Albums must surpass certain amount of sales in order to be nominated for a Grammy. Grammys, *The Recording Academy Releases Updated Rules & Guidelines for the 2022 Grammy Awards Show*, RECORDING ACADEMY (May 26, 2021, 1:00 PM), <https://www.grammy.com/news/2022-grammys-updated-rules-guidelines-recording-academy> [<https://perma.cc/BY6K-YP43>]. While Russ was not chosen as a nominee, sales of his album made him Grammy eligible, which is a massive achievement. *See* Grant, *supra* note 49 (stating Russ sold 7,000 units over a mere few days).

54. Taylor Ohryn, *We Have Been Waiting for This to Drop, from TikTok to Real Life Stacey Ryan Don't Text Me When You're Drunk Is Out*, HASHTAG MAG. (Mar. 24, 2022), <https://hashtagmagazine.net/home/2022/3/24/o3w4o0001wshoup3jknfvlojhtphwb> [<https://perma.cc/4ZYU-44EZ>]; *see* Seabrook, *supra* note 26 (highlighting singer-songwriter Stacey Ryan who released a version of her unfinished song *Don't Text Me When You're Drunk* after inviting creators to contribute verses through an open verse challenge on TikTok).

verses in a duet.⁵⁵ Among the other forty thousand duetting creators' videos, TikTok user Zai1k's contribution to her open verse challenge became a viral sensation.⁵⁶ The duet was streamed over twenty-five million times. It was so wildly popular that Ryan signed a seven-figure licensing deal with Island Records within months of posting the open verse challenge.⁵⁷ Ryan has now released more singles with equal success, opened for widely known bands, and reached a new level of popularity nearly overnight due to the attention she gained from a single open verse challenge.⁵⁸ Additionally, the following that she gained on TikTok due to the song gave her immense bargaining power, as evidenced by the fact that she was allowed to retain the rights in her music when she signed with Island Records, which is extremely uncommon.⁵⁹

Zai1k often duets viral open verse challenges.⁶⁰ His response to Sadie Jean's "WYD Now?" open verse challenge was met with praise as well.⁶¹ Sadie Jean's original single is popular on streaming platforms, due in part to the open verse challenge's success in spreading her song.⁶² Sadie Jean's open verse challenge seemed to perfectly match the

55. Seabrook, *supra* note 26. Zai1k's TikTok currently has 20.4 million likes. Zai1k (@zai1k), TIKTOK, https://www.tiktok.com/@zai1k?t=8enCbnyR4w6&_r=1 [<https://perma.cc/UD7E-N9JX>].

56. Seabrook, *supra* note 26; Ohryn, *supra* note 54.

57. Ohryn, *supra* note 54; Seabrook, *supra* note 26 (reporting that Stacey Ryan signed a seven-figure licensing deal with Island Records after the success of *Don't Text Me When You're Drunk* open verse challenge); Thomas Darro, *From Open Verse Challenges to Sold Out Stages—Interview with Stacey Ryan*, ROAD TRIP PLAYLISTS (Nov. 17, 2022), <https://roadtripplaylists.com/stacey-ryan-interview> [<https://perma.cc/8PFJ-FDZ7>] (revealing that the final version of *Don't Text Me When You're Drunk* featuring Zai1k gained over twenty-five million streams).

58. Ohryn, *supra* note 54.

59. Seabrook, *supra* note 26. Ryan was able to retain both her master copyright and her publishing rights. *Id.* Requiring artists to sign over their master copyrights and publishing rights in exchange for the financial backing to make music full-time has been labels' process for decades when signing new artists, but that has been shifting very slowly in recent years. *Why Owning Your Master Recordings Means Everything*, AWAL (Sept. 19, 2018), <https://www.awal.com/blog/maintaining-ownership-rights-as-an-artist> [<https://perma.cc/2JRU-5QFL>].

60. Jon Caramanica, *How Big Can a TikTok Duet Get?*, N.Y. TIMES (Jan. 11, 2022), <https://www.nytimes.com/2022/01/11/arts/music/sadie-jean-wyd-now-lil-yachty.html> [<https://perma.cc/WGE3-2AJF>] (last updated Jan. 12, 2022).

61. *Id.*; Parth Sinha & Pavel Telica, *Examining the Power of the Tik Tok's Duet Feature*, MEDIUM (July 20, 2022), <https://parthmusic.medium.com/examining-the-power-of-the-tik-toks-duet-feature-cef432616d2e> [<https://perma.cc/5D7A-NSV5>].

62. Caramanica, *supra* note 61.

format by ending her verse with the lyrics “so what are you doing now?” before passing the mic to the contributors.⁶³ This cue resulted in several popular duets, including one by established rapper and singer Lil Yachty. Additionally, Sadie Jean often re-duetted contributors’ duets.⁶⁴

Open verse challenges have become a way for contributors to add their own flair to tracks, while also helping the original creator’s music to gain popularity.⁶⁵ However, these types of challenges, and the attention they bring, can mean that artists need to move fast to release their songs that are the subjects of open verse challenges before the internet’s attention moves elsewhere.⁶⁶ Some artists have partially built their careers on their ability to sense the balance that they need to strike between releasing a song sooner while it is garnering attention and releasing a song after its popularity has increased.⁶⁷ Lauren Spencer-Smith’s “Fingers Crossed” is such an example.⁶⁸ Her song was not finished when she leaked a clip,⁶⁹ but when the clip went viral after an open verse challenge, she needed to release the track on streaming platforms before she lost people’s attention.⁷⁰ That song’s success resulted in Lauren Spencer-Smith signing a dual deal with Republic and Island Records just a month after “Fingers Crossed” was released.⁷¹ The sheer scale of success that can result from open verse challenges is why it is important to determine the copyright ownership in these duets.

To appreciate the importance of music’s use on TikTok, the music business and the way music is licensed first must be understood. First, in every recorded piece of music, there are two copyrighted works: the sound recording and the underlying composition of that sound

63. *Id.*

64. *Id.*

65. *Id.*

66. Rania Aniftos, *Chartbreaker: How Lauren Spencer-Smith Took ‘Fingers Crossed’ from TikTok to Top 20 Success*, BILLBOARD (Mar. 12, 2022), <https://www.billboard.com/music/pop/lauren-spencer-smith-fingers-crossed-billboard-march-2022-chartbreaker-interview-1235037661> [<https://perma.cc/RN5H-GC74>].

67. *See id.* (noting that artists need to wait long enough for enthusiasm to build before releasing the song on streaming services, but not so long that their music has moved off of most people’s “For You” pages).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

recording.⁷² The underlying composition is the musical work, including any accompanying lyrics, which is then incorporated into a sound recording.⁷³ Compositions are usually created by songwriters, lyricists, and/or composers.⁷⁴ A sound recording is a “series of musical, spoken, or other sounds fixed in a recording medium, such as a CD or digital file, called a ‘phonorecord.’”⁷⁵ Sound recordings are created by the performer, along with the producer or recording label.⁷⁶

Second, it is important to understand how the ownership of the compositions and sound recordings operate within the music industry. The copyright for a composition is held by the author, namely the songwriters, lyricists, and composers, as well as by their music publishers.⁷⁷ Often, the author and publisher share the copyright for a composition.⁷⁸ Generally, the author signs a publishing deal and transfers a percentage of their share in the royalties from the use of the composition, the “publisher’s share,” to the publisher in exchange for their services.⁷⁹ Performance Rights Organizations (“PROs”) collect royalties on behalf of composers and publishers from the public performance of musical works.⁸⁰ To do this, PROs grant licenses to venues, radio stations, and businesses to use their catalog of music in exchange for a fee, and they track how often each composition gets played.⁸¹

The copyright for a sound recording, referred to as the master copyright, is held by the performing artists and, typically, their label.⁸² Most commonly, the record label handles a work’s copyrights and royalties, and owns the rights to exploit the master copyright on behalf

72. *What Musicians Should Know About Copyright*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/engage/musicians> [<https://perma.cc/R7BU-SWZB>].

73. 17 U.S.C. § 102(a)(2).

74. *What Musicians Should Know About Copyright*, *supra* note 72.

75. *Id.*; see 17 U.S.C. § 101 (defining sound recording and phonorecord).

76. *What Musicians Should Know About Copyright*, *supra* note 72.

77. Dmitry Pastukhov, *6 Basics of Music Copyright Law: What It Protects and How to Copyright a Song*, SOUNDCHARTS (Feb. 10, 2020), <https://soundcharts.com/blog/music-copyrights> [<https://perma.cc/5PWN-N6SZ>].

78. *Id.*

79. *Id.*

80. Sayana, *A Beginner’s Guide to Performing Rights Organizations (PROs)*, SPLICE (Jan. 19, 2023), <https://splice.com/blog/performing-rights-organizations-guide> [<https://perma.cc/82XE-K9WH>]. Performance Rights Organizations are an integral part of the music publishing process for composers. *Id.* The most common PROs include ASCAP, BMI, and SESAC. *Id.*

81. *Id.*

82. Pastukhov, *supra* note 77.

of the artists.⁸³ It is increasingly common for performing artists to license the sound recording to the label for a fixed period of time, which allows the artists to retain the right to their master copyright and the ultimate control of their music.⁸⁴

Third, music streaming services have greatly changed the way that music is licensed.⁸⁵ Revenues from music sales and licensing in the United States sharply declined between 2000 to 2009, when digital music platforms and services started to pop up, but revenues then grew steadily from streaming platforms.⁸⁶ By 2014, all streaming services revenue made up about twenty-seven percent of the total music industry revenues.⁸⁷ Music streaming caused a massive shift in how much consumers are willing to spend on music, from consumers paying over \$10 for one CD to less than \$100 per year for the entire Spotify catalog.⁸⁸ There is a vast difference in how compositions and sound recordings must be licensed as their works are treated very differently in the digital realm.⁸⁹ Obtaining the rights to perform and make copies of sound recordings and compositions requires different negotiations with different parties.

All of the foregoing discussed in this Part results in a complicated licensing process for the use of both the composition and the sound recording.⁹⁰ The public performance of a composition usually falls under a blanket license obtained from the PROs.⁹¹ Additionally, under section 115 of the Copyright Act,⁹² anyone may make and distribute phonorecords of nondramatic musical works through a compulsory

83. *Id.*

84. *Id.*

85. Jason Koransky, *Digital Dilemmas: The Music Industry Confronts Licensing for On-Demand Streaming Services*, AM. BAR ASS'N (Jan. 2016), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2015-16/january-february/digital-dilemmas-music-industry-confronts-licensing-on-demand-streaming-services [https://perma.cc/U777-6VSH].

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. This Note will attempt to lay out simply a bare bones explanation of the process of licensing music, but the intricacies of the specific details of each license will depend on the surrounding facts.

91. Sayana, *supra* note 80. A “blanket license” allows the licensee to utilize any and all of the music in a PRO’s repertoire in exchange for a fee. *See id.* Authors not affiliated with a PRO often miss out on these royalties, as there is no simple way for an author to track this type of use on their own. *Id.*

92. 17 U.S.C. § 115.

license.⁹³ Section 115 only covers the composition underlying a sound recording; it does not grant a license to a prior sound recording of the composition.⁹⁴ Also termed a mechanical license, this compulsory license permits artists to cover songs or record new compositions and make them available online and digitally for streaming and downloading.⁹⁵ Those wishing to license compositions for these purposes must adhere to section 115's notice requirements and pay proper royalties to the compositions' copyright owner.⁹⁶

There are two primary types of online music streaming services: noninteractive, which do not allow a user to choose the exact song they want, and interactive, which allow a user to choose to listen to a particular song or album in the service's catalog.⁹⁷ The public performance right for sound recordings is limited to digital audio transmissions.⁹⁸ However, section 114 creates a statutory license for non-interactive public performances.⁹⁹ These licenses are administered by SoundExchange, the music rights organization designated by the United States government to administer section 114 sound recording licenses, which collects and distributes digital performance royalties on behalf of owners.¹⁰⁰ If the public performance is interactive, and not covered by the section 114 statutory license, then a license for public performance of the sound recording by digital audio transmission must be negotiated with the

93. *Id.* Compulsory licenses are licenses set by law or through some form of adjudication. *License*, BLACK'S LAW DICTIONARY (11th ed. 2019).

94. 17 U.S.C. § 115(a)(1)(B). The royalties from these licenses are collected by PROs, as discussed earlier. *See supra* note 91 and accompanying text.

95. 17 U.S.C. § 115. These recordings cannot change the composition in any basic way. U.S. COPYRIGHT OFF., CIRCULAR 73: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS 3, <https://www.copyright.gov/circs/circ73.pdf> [<https://perma.cc/5Q4F-SF5E>] (last modified Jan. 2018).

96. 17 U.S.C. § 115. For example, Spotify pays the copyright owners of compositions a flat rate per stream set by the Copyright Royalty Board. *See, e.g.*, 17 U.S.C. § 801(b) (outlining the Copyright Royalty Board's role in setting "reasonable terms and rates of royalty payments").

97. Koransky, *supra* note 85.

98. 17 U.S.C. § 114.

99. *Id.*

100. *Who We Are: About SoundExchange*, SOUNDEXCHANGE, <https://www.soundexchange.com/who-we-are> [<https://perma.cc/6XPL-QR42>].

owners of the sound recording, and a master use license for the sound recording must be obtained.¹⁰¹

In addition to licensing for public performances, any use of the composition and sound recording in an audiovisual program requires a licensee to obtain a synchronization license for the composition and sound recording.¹⁰² While a synchronization license allows for specific uses of the composition, a master use license is necessary for the use of the original sound recording.¹⁰³ These licenses are negotiated with the owners of the composition and sound recording copyrights.¹⁰⁴ Finally, to display lyrics without committing copyright infringement, a license is needed from the music publisher or the owner of the composition.¹⁰⁵

Currently, copyright issues in the music industry mostly center around sampling disputes and other types of outright infringement.¹⁰⁶ Sampling is the practice of lifting portions of an existing recording and using this 'sample' as a component of a new song.¹⁰⁷ To avoid copyright infringement, artists who wish to sample a song must get a license from both the owner of the sound recording's master copyright and the owner of the composition's copyright.¹⁰⁸ The license terms are usually dictated by the copyright owners, including terms on payment and the types of usage allowed.¹⁰⁹ While the artist wishing to use the sound by

101. U.S. COPYRIGHT OFF., MUSICAL WORKS, SOUND RECORDINGS & COPYRIGHT (2020), <https://www.copyright.gov/music-modernization/sound-recordings-vs-musical-works.pdf> [<https://perma.cc/L4M5-RR6Z>].

102. Calvin R. Nelson, *Legal Implications of Syncing Copyrighted Music with Other Content*, VENABLE, LTD. LIAB. P'SHIP (Jul. 14, 2020), <https://www.venable.com/insights/publications/2020/07/legal-implications-of-syncing-copyrighted-music> [<https://perma.cc/ZPC3-M4G7>].

103. *See id.* (explaining how these licenses are needed when incorporating the music into film, a TV program, a video, or other audiovisual program).

104. *Id.*

105. 17 U.S.C. § 106.

106. *See generally* Alexandra Tasev, *Intellectual Property in the Digital Streaming Age: How Music Becomes a Lawsuit*, PACE UNIV., Dec. 9, 2020, at 8, https://digitalcommons.pace.edu/honorscollege_theses/319 [<https://perma.cc/3YC9-M4GB>] (discussing how legal issues arise in the music industry through an analysis of copyright law).

107. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 250, 292 (10th ed. 2019).

108. *Id.* at 251.

109. Chris Robley, *How to Legally Clear Samples to Copyrighted Music*, DIY MUSICIAN (Jul. 10, 2019), <https://diymusician.cdbaby.com/music-rights/clear-samples-to-copyrighted-music> [<https://perma.cc/9MXG-3XRJ>]; *see also* Justin Jacobson, *Music Sampling 101*, TUNE CORE (Mar. 21, 2019), <https://www.tunecore.com/guides/music-sampling-and-beat-licensing-101> [<https://perma.cc/F87V-ZF3R>] (describing the licensing process and some of the terms and pricing that may be required for sampling).

simply recreating the recording could bypass the owner of the master copyright, the artist would still need a license from the owner of the composition.¹¹⁰ In contrast, a “co-write,” an industry term for a musical composition written by two or more writers, is similar to the duets from TikTok.¹¹¹ Ownership of this musical composition is split based on the amount of the song that each artist wrote.¹¹² Borrowing has long been a defining feature of music creation, especially since there are only twelve notes in the Western musical system and since the line between where one’s musical idea ends and another’s expression begins is very blurry.¹¹³

II. JOINT WORKS UNDER THE COPYRIGHT ACT OF 1976

Under the Copyright Act of 1976, copyright protection exists in “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹¹⁴ This language in section 102 of the Copyright Act lays out three requirements that a work must meet for it to be protected under copyright law: the work must be original, a work of authorship, and fixed in a tangible medium.¹¹⁵ These requirements are the structure for all copyright protection, including joint works and derivative works.¹¹⁶ This Part will lay out the requirements for joint works and derivative works, and it will discuss the ownership impacts of a work being classified as either. To fully understand these types of works, however, the threshold prerequisites for copyright protection must first be understood.

110. PASSMAN, *supra* note 107, at 251.

111. *Id.* at 292.

112. *Id.* These writers are encouraged to create “split sheets” while co-writing so that the correct share is registered with co-writers’ respective music publishers; this ensures that each co-writer receives the proper royalties from the composition. Noelle Gambuti, *What Is a Co-Writer?*, SONGTRUST (Oct. 13, 2022), <https://blog.songtrust.com/what-is-a-co-writer> [<https://perma.cc/M3K8-TFLV>].

113. Gersham Johnson, *All Songs are Derivative Works: Copyright and the Reality of Music Composition*, COLUM. J.L. & ARTS (Dec. 17, 2020), <https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/370> [<https://perma.cc/D8GF-2A52>].

114. 17 U.S.C. § 102(a).

115. *See generally id.* § 102 (defining the boundaries of what can be protected under copyright).

116. *Id.*

A. *Prerequisites for Copyright Protection*

There are three requirements for a work to be protected by copyright law.¹¹⁷ First, the work must be original.¹¹⁸ Originality requires both that the work was independently created by an author and that the work possesses a minimal degree of creativity.¹¹⁹ Independent creation requires that the author created the work without copying from other works.¹²⁰ Only the original aspect of a work of authorship is protected.¹²¹ A work may be considered independently created even if it resembles other works, as long as it is not copied.¹²² The requirement for creativity is very low.¹²³ Originality can be determined by considering several factors, including the rendition, the timing, and the creation of the subject.¹²⁴ The most important distinction when determining originality is whether the work solely consists of facts and ideas, which cannot be copyrighted, or if it is a “particular expression

117. *Id.*

118. *Id.*

119. *See* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (determining that the parties' white pages in their publications were not copyrightable because they were uncopyrightable facts that were arranged and chosen for functionality, rather than due to creativity of the authors).

120. *Id.* at 345.

121. *Id.* at 346. Copyright law protects components of a work “that are original to the author” but “[o]riginality does not signify novelty.” *Id.* at 345, 348. For example, another author may copy the underlying facts of a nonfiction novel, assuming that those facts are pulled from the real world, but they may not copy the words used to express those particular facts. *Id.* at 348. This distinction is important in situations surrounding biographies, both in books and films, as there is often a series of events in a person's life that need to be included for the work to make sense or to be accurate. *See id.* (noting the inability of President Ford to prevent others from utilizing “bare historical facts from his autobiography”). Allowing that amount of factual similarity but requiring that the separate authors have their own way of telling the story with those facts keeps authors from copying each other outright. *Id.*

122. *Id.* at 345. The Copyright Office has stated that, hypothetically, two authors of similar, or even identical works, could each register their works if the authors did not copy each other. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES ch. 300, at 8 (3d ed. 2021), <https://www.copyright.gov/comp3/docs/compendum.pdf> [<https://perma.cc/Z633-C6KA>] (section 308).

123. U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 9 (section 308.2) (stating that a “vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious it might be’” (quoting *Feist Publ'ns, Inc.*, 499 U.S. at 346)). However, “creativity” is lacking when the author's expression is obvious or practically inevitable. *Id.*

124. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58–59 (1884).

of that idea or fact, [which] can be.”¹²⁵ Copyright does not extend to “common or trite musical elements” or “commonplace elements that are firmly rooted in the genre’s tradition.”¹²⁶

Second, the work must be fixed in a tangible medium of expression.¹²⁷ A work is “fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹²⁸ A work consisting of transmitted sounds and/or images, or both, that are being transmitted, is “fixed” if a fixation of the work is “being made simultaneously with its transmission.”¹²⁹ All material objects in which copyrightable works are capable of being fixed can be considered a “copy” or “phonorecord.”¹³⁰

Third, the work must be a work created by an author and fall under a protected category of work.¹³¹ The authorship requirement refers only to works that are created by a human being.¹³² The word “author” is “traditionally used to mean the originator or the person who causes

125. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1264 (10th Cir. 2008). In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court reinforced that no one may copyright facts or factual compilations because facts do not owe their origin to the author. 499 U.S. at 347. The Court emphasized that there is a line between creativity and discovery. *Id.*

126. *Skidmore v. Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) (noting that these elements belong in the public domain and cannot be exclusively appropriated by any particular author). The Copyright Office will accept works even when not innovative or surprising; however, it will not accept works that are “devoid of even the slightest traces of creativity.” U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 9 (section 308.2). Additionally, the Copyright Office rejects works that are merely reflections of “age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.” *Id.*

127. 17 U.S.C. § 102.

128. *Id.* § 101.

129. *Id.*

130. U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 6 (section 305). The Copyright Act leaves open the possibility of methods of fixation being expanded by including the language “any method now known or later developed.” *Id.* Some works do not satisfy this requirement because they are not fixed, such as an improvisational speech, but some do not meet the requirement because their fixation was not in a tangible form for long enough to be considered sufficiently permanent or stable to satisfy the fixation requirement. *Id.*

131. 17 U.S.C. § 102(a).

132. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 7 (section 306).

something to come into being, or even the first cause.”¹³³ Additionally, works of authorship must fall under copyright subject matter to be protected.¹³⁴ Copyright protection extends to limited types of works of authorship that are named in section 102(a) of the Copyright Act, including “musical works, including any accompanying words” and “sound recordings.”¹³⁵ Copyright law recognizes a distinction between sound recordings and the underlying musical composition.¹³⁶ When sound recordings involve the performance of an underlying musical work, the sound recording is considered to be a derivative work.¹³⁷ As discussed above, a sound recording is the “aggregation of the sounds captured in the recording while the song or tangible medium of expression embodied in the recording is the musical composition;”¹³⁸ whereas musical works are the underlying composition and encompass any combination of the melody, harmony, or rhythm, along with the accompanying lyrics.¹³⁹

133. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000). The Court dealt with the term “author” in *Burrow-Giles Lithographic Co. v. Sarony*, describing it as “the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be $\frac{3}{4}$ the man who is the effective cause of that.” 111 U.S. at 61.

134. U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 7 (section 307). These categories do not exhaust the scope of original works of authorship that the Copyright Act is intended to protect. *Id.* at 8. However, the Copyright Office and the courts do not have the power to create new categories of authorship. *Id.* That power is left to the discretion of Congress. *Id.*

135. 17 U.S.C. § 102(a).

136. *Corwin v. Quinonez*, 858 F. Supp. 2d 903, 909 (N.D. Ohio 2012).

137. 17 U.S.C. §§ 102(a)(2), (a)(7), 103.

138. *Corwin*, 858 F. Supp. 2d at 909.

139. See 17 U.S.C. § 102 (including the accompanying words within musical works as copyrightable). This distinction between a sound recording and a musical work is important, especially in terms of how authors can monetize their work within the music business. Mark Tavern, *For the (Re-)Record: Here's What You Need to Know About Re-Recording Restrictions*, SYNCHTANK (Aug. 6, 2019), <https://www.synchtank.com/blog/for-the-re-record-heres-what-you-need-to-know-about-re-recording-restrictions> [<https://perma.cc/46RF-EAJY>]. A well-known example is when Taylor Swift chose to re-record her body of work when her masters were sold, leaving her without any control over her body of work or ability to use it for herself. Rhea Rao, *Explained: Why Taylor Swift is Re-Recording Her Studio Albums, and What it Says About Copyright Battles with Mega Music Labels*, FIRSTPOST (Nov. 16, 2021), <https://www.firstpost.com/entertainment/explained-why-taylor-swift-is-re-recording-her-studio-albums-and-what-it-says-about-copyright-battles-with-mega-music-labels-10138211.html> [<https://perma.cc/GET6-AD99>]. However, Taylor Swift is also the author of the underlying composition, the musical

B. Joint Authorship

“A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁴⁰ Joint authorship is often determined by the two-prong test from *Childress v. Taylor*.¹⁴¹ The first prong is that each party must have intended to be joint authors.¹⁴² The second is that each party must have made an independently copyrightable contribution to the work.¹⁴³

To satisfy the first prong, there must be a showing that all the authors had the intention that their contributions would be merged into a part of a unitary whole, and therefore be inseparable or interdependent.¹⁴⁴ “Parts of a unitary whole are [considered] ‘inseparable’ when they have little or no independent meaning standing alone.”¹⁴⁵ They are considered interdependent when they have some meaning standing alone, but achieve their primary significance because of their combined effect.¹⁴⁶ Courts look at the intention at the time of the

work, and the accompanying words. *Id.* She was able to re-record her musical work because copyrights of sound recordings only protect the sounds recorded on that particular sound recording, not any sound recording of the music work. *See id.* (reporting that Taylor Swift was able to re-record her albums for full masters rights to the new recordings, while Ithaca Holdings maintained masters rights to the previous recordings). The right to that protection only exists for the owner of the copyright in the musical work, in this case, Taylor Swift. *See, e.g., id.*

140. 17 U.S.C. § 101.

141. 945 F.2d 500 (2d Cir. 1991); *see also Corwin*, 858 F. Supp. 2d at 910 (applying the Second Circuit’s test and noting that the Sixth and Seventh Circuits have adopted this test); *BTE v. Bonnacaze*, 43 F. Supp. 2d 619, 624 (E.D. La. 1999) (applying the *Childress* test).

142. *Corwin*, 858 F. Supp. 2d at 910.

143. *Id.*

144. *Childress*, 945 F.2d at 505. The touchstone of joint authorship is the authors’ intention. H.R. REP. NO. 94-1476, at 120 (1976).

145. *Childress*, 945 F.2d at 505.

146. H.R. REP. NO. 94-1476, at 120 (1976) (noting that music and lyrics are interdependent parts of a whole). The Copyright Register’s report stated that “where the composer of music and the author of lyrics intended to have their contributions integrated as a song, the courts have held the song a joint work even though the music and lyrics could each be used separately.” STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REP. ON THE GENERAL REVISION OF THE U.S. COPYRIGHT 89 (Comm. Print 1961); *see also* STAFF OF H. COMM. ON THE JUDICIARY, 89TH CONG., SUPP. REP. ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 65 (Comm. Print 1965) [hereinafter SUPP. REP.] (stating that the words and music that comprise a song or the many contributions that make up a motion picture would be examples of interdependent parts). It is important

work's creation and whether that intention was for the parts to be absorbed or combined into an integrated unit.¹⁴⁷ This intention requires the contributors to contemplate the concept of joint authorship.¹⁴⁸ This intent is particularly scrutinized where one person is clearly the dominant author of the work; the question becomes if that dominant author is in reality a sole author instead of a joint author with another contributor.¹⁴⁹ Additionally, the "factual indicia of ownership and authorship" can be very helpful in determining whether there was intent to be joint owners.¹⁵⁰ These indicia include the contributor's decision-making authority over what changes are made and what is included in the work, the way in which the parties bill or credit themselves with regard to the work, and any written agreements with third parties.¹⁵¹ When an author credits only themselves, that is prima facie proof that the work was not intended to be joint work.¹⁵²

The second prong requires that, to be a joint work, a collaborative contribution must be an original expression that could be the subject

to note that this opinion was formed from cases decided prior to the enactment of the Copyright Act of 1976. See H.R. REP. NO. 94-1476, at 1 (1976) (committed to the Whole House and printed on September 3, 1976).

147. *BTE v. Bonnacaze*, 43 F. Supp. 2d 619, 622 (E.D. La. 1999); *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998). It is clear from the legislative history that the intent must exist at the time of the "writing" and that a joint work is not created simply through a merger with preexisting material. H.R. REP. NO. 94-1476, at 120. The Register noted that some case law had already gone too far in allowing preexisting materials to merge with new material to be considered joint works, opining that "the courts have broadened the concept of joint authorship beyond its reasonable limits." SUPP. REP., *supra* note 146, at 65. Defining this "reasonable scope" is part of the distinction of joint works from derivative works, as discussed further in Section II.C.

148. *BTE*, 43 F. Supp. 2d at 623.

149. *Id.* at 624 (determining that the songs that were written by members of the band Better Than Ezra were not joint works).

150. *Id.* at 624-25.

151. See *id.*; see also *Thomson*, 147 F.3d at 203 (noting that billing or credit is a window into the mind of the party who is responsible for giving the billing or the credit). In *Thomson v. Larson*, the court particularly focused on the fact that Larson had specifically not wanted a book writer because he wanted to make the project entirely his own and that Larson, at no point before his death, had ever viewed Thomson as a co-author. 147 F.3d at 203. It was only after Larson's death that Thomson asked for title credit for her contributions to the play, which she was not given by Larson. *Id.*

152. See *id.* at 203-05 (finding that *RENT* was not a joint work, since the author did not give title credit and opposed working with other contributors from the beginning).

matter of copyright on its own.¹⁵³ Collaboration alone is not enough to establish joint authorship, but, rather, the contributors must each add something more.¹⁵⁴ Each contributor must supply more than just directions or ideas to be an author.¹⁵⁵ Courts determine whether each contribution, standing alone, would be protectable under copyright law.¹⁵⁶ In *Ulloa v. Universal Music & Video Distribution Corp.*,¹⁵⁷ the court considered a case brought against Jay-Z and other defendants by a singer who contributed vocal tracks but was not credited for her work.¹⁵⁸ The court noted that contributions by a sound engineer, editor, or producer may result in a joint ownership between the record producer and a performance artist.¹⁵⁹ However, those separate contributions were not enough to support a claim of joint authorship, as there was no proof that Jay-Z, or the other defendants, intended to become a joint author with Ulloa.¹⁶⁰

153. See *BTE*, 43 F. Supp. 2d at 625, 627 (holding that there was no showing that the contribution had ever been fixed in a tangible medium, and, therefore, it was not a joint work). This is the majority view, but there are alternative views, namely Melville Nimmer, who actively argues in opposition to this requirement. MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT § 6.07* (2023). Nimmer argues that the language of the Copyright Act does not contain any requirement that each author contributes an independently copyrightable component to the joint work. *Id.* Nimmer further argues that legislative history elevates intention as the touchstone without placing any further parsing as to the copyrightable status of each individual component that the parties intend to contribute to the work as a whole. *Id.* (citing H.R. REP. NO. 94-1476, at 120 (1976)). Additionally, the Ninth Circuit has admitted that the issue is “not completely settled in the case law.” *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990).

154. *Thomson*, 147 F.3d at 200.

155. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071 (7th Cir. 1994).

156. See *id.* at 1071–72 (finding that discussions about what would be included in a play at rehearsals did not create a joint work); *Thomson*, 147 F.3d at 200 (discussing the intent of both parties to determine title credit); *BTE*, 43 F. Supp. 2d at 623 (reiterating that collaboration is not enough without each author’s contribution being independently copyrightable).

157. 303 F. Supp. 2d 409 (S.D.N.Y. 2004).

158. *Id.* at 411–12.

159. *Id.* at 418 (considering whether a counter melody added by a back-up singer to a preexisting melody resulted in joint ownership).

160. *Id.* Ulloa contributed the concept of adding a counter melody in her background vocals which ended up on the final track. *Id.* at 413. The court did not consider this to be enough to be copyrightable on its own. *Id.* at 418.

Under copyright law, joint authors are considered co-owners of a joint work¹⁶¹ and become tenants in common.¹⁶² Each author has “an independent right to use or license the use of a work, [but is] subject to a duty of accounting to the other co-owners for any profits.”¹⁶³ Joint authors hold undivided interests in a work, regardless of any differences in each author’s contribution.¹⁶⁴ Authors may exercise their rights as authors independently of their co-owners, and they are not required to join them in an action for infringement.¹⁶⁵ However, a co-owner cannot unilaterally grant an exclusive license or transfer ownership of the joint work.¹⁶⁶ Joint authorship also affects the termination of those licenses because it requires the majority of the authors who executed the grant to authorize the termination.¹⁶⁷

C. *Derivative Works*

“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”¹⁶⁸ Additionally, a work consisting of editorial revisions, annotations, or other modifications, which represent an original work or authorship, is also a “derivative work.”¹⁶⁹ Copyright owners have an exclusive adaptation right to

161. 17 U.S.C. § 201(a).

162. *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640, 646 (S.D.N.Y. 1970), *aff’d*, 457 F.2d 1213 (2d Cir. 1972).

163. *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007). This is the traditional approach; however, some courts have allowed for different splits when a joint author produces only a small part of another’s film. NIMMER & NIMMER, *supra* note 153, § 6.08. Nimmer clarifies that in some circumstances, when the authors have made disparate copyrightable contributions to the work, the authors’ ownership shares may be determined in relative proportion to their individual contributions as dictated by common law. *Id.* Courts will give equal ownership shares in a joint work when each author has made the same qualitative type of contributions. *Id.* For example, when a lyricist and composer combine their efforts, each makes the same qualitative type of contributions to the resulting composition in comparison to some joint authors’ contributions to a film as a joint work. *Id.* § 6.08 n.34.

164. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994).

165. *Davis*, 505 F.3d at 99.

166. *Id.* at 100. Joint authors may transfer their interest in the work but not the work itself. *Id.* at 99.

167. 17 U.S.C. § 203(a)(1).

168. *Id.* § 101.

169. *Id.*

prepare derivative works that are based on their copyrighted work.¹⁷⁰ This means that when someone other than the owner prepares a derivative work without the owner's permission, that person has infringed on the copyright rights of the underlying work's owner and is subject to liability.¹⁷¹ For derivative works to be original, the author must manifest sufficient nontrivial expressive variation to make it distinguishable from the underlying work in some meaningful way.¹⁷² The originality requirement for derivative works is not more demanding than the originality requirement for other works.¹⁷³

The copyright in a derivative work only extends to the contributed material, not the preexisting material, and it does not imply any exclusive right in the preexisting material.¹⁷⁴ The copyright is independent of, and does not affect or enlarge, the scope, duration, ownership, or substance of any copyright protection in the preexisting material.¹⁷⁵ Just as an artist sampling a song needs to seek permission from the copyright owners of the sound recording and its underlying musical work,¹⁷⁶ an artist creating a derivative work without the permission of the copyright owners of the sound recording and its underlying musical work risks infringement.¹⁷⁷ The distinction between a joint work and derivative work is difficult, and a work can sometimes be considered both.¹⁷⁸ The main distinction lies in the

170. *Id.* § 106(2).

171. *Id.* Copyright in a derivative work merely protects against copyright or otherwise infringing the original contribution contained in the derivative work. NIMMER & NIMMER, *supra* note 153, § 3.04. Permission is required to convert an underlying work into a derivative work. *Id.* When such permission is lacking, copyright protection may be forfeited in the derivative work to the extent that the underlying work continues to enjoy copyright protection. *Id.*

172. *Schrock v. Learning Curve Int'l, Inc.*, 586 F.3d 513, 521 (7th Cir. 2009).

173. *Id.* at 520–21.

174. U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 14, ch. 500, at 28 (sections 311.1 and 508.2).

175. 17 U.S.C. § 103(b). The Copyright Act specifically grants the author of a derivative work copyright protection in the incremental original expression the author contributes, as long as the derivative work does not infringe the underlying work. *Schrock*, 586 F.3d at 518.

176. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976), *aff'd*, 722 F.2d 988 (2d Cir. 1983); *Grand Upright Music Ltd. v. Warner Bros. Recs., Inc.*, 780 F. Supp. 182, 185 (S.D.N.Y. 1991). See generally *Williams v. Gaye*, 895 F.3d 1106, 1119–21 (9th Cir. 2018) (elaborating on copyright protection for musical compositions); *Schrock*, 586 F.3d at 518 (discussing derivative works).

177. *Williams*, 895 F.3d at 1119.

178. NIMMER & NIMMER, *supra* note 153, § 6.05.

intent of each contributing author at the time that they compose their contributions.¹⁷⁹

III. APPLICATION OF COPYRIGHT LAW TO OPEN VERSE CHALLENGES

When a creator posts their song on TikTok, there are copyright protection issues that come into play immediately.¹⁸⁰ Just as works evolve on TikTok through their use by others, so too do their iterations' protectability, ownership, and infringement.¹⁸¹ Each new duet creates a new sound which may or may not be a protectable work on its own.¹⁸² However, with the fluid nature of the internet and the informal rules around how creators use and credit sounds by other creators, the realities of ownership over these duets are difficult to determine.¹⁸³

178. *Id.*

179. 17 U.S.C. § 102. As soon as any author puts their work into the world where others can enjoy, copy, or utilize it in general, copyright protection becomes important to maintain that author's rights in their work. *Id.* TikTok's Terms of Service requires that users have the proper clearances and licenses to post anything on the application. *Terms of Service*, TIKTOK, § 7, <https://www.tiktok.com/legal/page/us/terms-of-service/en> [<https://perma.cc/7XXS-5LE5>] (last updated July 2023). Additionally, the terms include a clause under which the User, by submitting their content via the app, grants TikTok an

unconditional, irrevocable, non-exclusive royalty-free fully transferable perpetual worldwide license to use, modify, adapt, reproduce, make derivative works of, publish, and/or transmit, and/or distribute and to authorize other users of the services and other third parties to view, access, use, download, modify, adapt, reproduce, make derivative works of, publish and/or transmit [their content] in any format and on any platform, either now known or hereinafter invented.

Id. The terms explicitly state that this includes the right to reproduce sound recordings and make mechanical reproductions of the underlying musical works. *Id.* The terms also specifically warn authors of musical works and recording artists to ensure their usage does not infringe on agreements with their PROs and their record labels. *Id.*

181. For this Note, I only focus on the ownership and protectability of sounds in connection with open verse challenges, but there are quite a few copyright questions implicated when it comes to sounds in general when used by those who are not the original authors.

182. Richard Yao, *What TikTok Tells Us about the Future of Music Business*, MEDIUM (Aug. 27, 2020), <https://medium.com/ipg-media-lab/what-tiktok-tells-us-about-the-future-of-music-business-1cdc8c18a2a2> [<https://perma.cc/M4NG-FACZ>].

183. *Id.*

A. *Duets by Creators Meet the Intent Requirement Under the Childress Test*

As discussed above, the first step under the *Childress* test is to determine whether the authors intended to become joint authors.¹⁸⁴ Open verse challenges are not simply an addition of vocals on top of the original creator's music; they are intentional invitations by the original creators for other creators to contribute.¹⁸⁵ When considering the duet between Russ and Ktlyn for "Handsomere," this becomes clear: Russ posted his song and invited others to duet his song.¹⁸⁶ Ktlyn's duet was a play on his lyrics, flipping the concept of Russ's song on its head to tell the story of Russ's song from the female perspective while maintaining the integrity of Russ's meaning.¹⁸⁷

Creators intend for open verse challenges to spark creativity, garner enthusiasm, and most importantly, invite collaboration with other creators.¹⁸⁸ The resulting sound combines the original sound from the open verse challenge, usually including a few lyrics that lead into the instrumental open verse, and the duetting creator's lyrics.¹⁸⁹ Posting an open verse challenge, and inviting other creators to duet it, demonstrates the original creator's clear intention to merge the original sound and the duetting creator's addition into a unitary whole.¹⁹⁰

184. *Childress v. Taylor*, 945 F.2d 500, 505–06 (2d Cir. 1991); *see also Corwin v. Quinonez*, 858 F. Supp. 2d 903, 910 (N.D. Ohio 2012) (explaining the court's adoption of the *Childress* test, which first requires the court to determine if the authors intended to be joint authors); *BTE v. Bonnezeze*, 43 F. Supp. 2d 619, 624 (E.D. La. 1999) (indicating the need for intent to determine whether joint authorship exists).

185. *BTE*, 43 F. Supp. 2d at 626.

186. Young, *supra* note 43.

187. *Id.* Ktlyn was able to emote the same feeling of Russ's song while holding true to her own style and brand, striking a balance craved by many online. *Id.*

188. *See Open Verse Challenge: What It Is, Why You Should Participate, and How to Host One*, VENICE MUSIC, <https://blog.venicemusic.co/open-verse-challenge> [<https://perma.cc/77BR-EWCE>] (listing benefits of participating in an open verse challenge); Gatollari, *supra* note 22 ("[Open verse challenges] function[] as a way for artists to connect with each other and potentially collaborate on work by seeing talent they probably wouldn't otherwise have been privy to.")

189. *See Gatollari, supra* note 22 (describing the Open Verse Challenge as a trend where creators on TikTok collaborate by adding their own verses to an original sound or beat).

190. *Childress v. Taylor*, 945 F.2d 500, 505–06 (2d Cir. 1991); *see also Corwin v. Quinonez*, 858 F. Supp. 2d 903, 910 (N.D. Ohio 2012) (citing step one of the *Childress* framework, which is the intention of both authors to collaborate); *BTE*, 43 F. Supp. 2d at 622 (citing *Childress*, 945 F.2d at 505) (explaining that one of the main principles

While determining ownership of these resulting sounds will always rely on specific facts, an important consideration would be whether the original creator composed the underlying musical work and recorded the sound while intentionally leaving it unfinished to allow space for an open verse challenge. The contributions in an open verse challenge are unfinished without each other.¹⁹¹ The original creator's song only includes a few lyrics, leaving it sounding unfinished without the duet.¹⁹² This open-endedness suggests that the original creators often compose their musical work with the intention that another creator contributes to that section of the song.¹⁹³ The duetting creator's additions would only be lyrical and would lack the context of the larger song and the instrumental accompaniment from the original creator. The duetting creator's intent is relatively easy to establish in cases like Ktlyn, or other duetters who are musical creators, because they create their contribution with the purpose of merging it with the original creator's sound to create a greater work as a duet sound. When combined, the duets are generally complete and polished.¹⁹⁴ More importantly, a duet

behind a joint work is that the "intention at the time the writing is done that the parts be absorbed or combined into an integrated unit"). These open verse challenges could result in multiple different "sounds" from multiple users duetting the challenge; each of these "sounds" that fit the other requirements of a joint work could create joint authorship of that sound. *Childress*, 945 F.2d 505–06 (laying out the requirements to create joint authorship).

191. Caramanica, *supra* note 60.

192. *Id.*

193. *Id.* It is common among new artists to write music for TikTok to generate engagement. Dan Whateley, *How TikTok is Changing the Music Industry and the Way We Discover New, Popular Songs*, BUS. INSIDER (Aug. 22, 2023, 1:00 PM), <https://www.businessinsider.com/how-tiktok-is-changing-the-music-industry-marketing-discovery-2021-7> [<https://perma.cc/Q59H-W5RG>]. The shift in the way that music is being written and formulated through social media such as TikTok could have large implications for the way that ownership of these musical works and sound recordings are determined in the future. *Childress*, 945 F.2d 505–06 (discussing the requisites for joint authorship). For creators who post their works on TikTok as the first introduction of the song to the world with an invitation to the musical community to collaborate and contribute, their intent to make their contributions part of a greater work is clear. Caramanica, *supra* note 60.

194. See Seabrook, *supra* note 26 (discussing *Don't Text Me When You're Drunk*); Young, *supra* note 43 (discussing *Handsome*); see also Grant, *supra* note 49 (discussing *Remember (Remix)*). The quality of the sound contributes to its marketability and popularity with other users. *Kantar Report: How Brands Are Making Noise and Driving Impact with Sound on TikTok*, TIKTOK (June 8, 2021), <https://www.tiktok.com/business/en-US/blog/kantar-report-how-brands-are-making-noise-and-driving-impact>

has meaning for those who wish to use it as a sound on TikTok, boosting the duet's popularity and its potential to generate capital.¹⁹⁵

Another important fact in determining ownership is the way the creators involved are credited.¹⁹⁶ Ktlyn tagged Russ when she duetted his open verse challenge.¹⁹⁷ Interestingly, and importantly, Russ then

-with-sound-on-tiktok [<https://perma.cc/DCJ4-2Q9H>] (reporting statistics related to the impact of sound on creativity, marketability, and popularity). It also allows record companies to see the type of product in which they would be investing. Yao, *supra* note 182 (stating that record labels are rushing to sign artists that have viral tracks on TikTok). What becomes interesting with TikTok is that many of the original creators are not necessarily the dominant authors, because most creators on TikTok are not yet signed to record labels and so have similar bargaining power. *Id.* This dynamic means that none of the authors would be the principal. *See* Seabrook, *supra* note 26. Some more well-known artists have participated in these open verse challenges, but the open verse challenges that have become popular do not usually include those previously well-known artists. *See id.* Additionally, even in a case like that of Russ and the two women who duetted his open verse challenges, although Russ had more power in the relationship due to his greater name brand power in the music world, the creators who duetted his open verse challenges had complete control over their contributions to the duet because they worked completely independently from him. Young, *supra* note 43; Grant, *supra* note 49. Some TikTok musicians have influence over others, and expressing their interest in a smaller creator's music by sharing it could boost that smaller creator. *See* Grant, *supra* note 49. There are certainly power dynamics in creating music in the digital sphere with larger artists, but the freedom is also expanded since there are often fewer clear incentives with another creator than in situations with more concrete rewards, such as record deal offers or gaining playbill credit for a Broadway production. *See id.*

195. Young, *supra* note 43; Grant, *supra* note 49; Seabrook, *supra* note 26. Duets with added or shifted meanings add to the original sound's ability to be capitalized. *See* Seabrook, *supra* note 26. Users might use the sound alongside a new trend or a competing trend, such as a female versus a male perspective on wealth in relationships, as in Russ and Ktlyn's duet. *Cf.* Grant, *supra* note 49 (highlighting the popular duet with Russ and Hailey Knox where they each provided perspective on a previous relationship). Every use of the sound boosts how often it streams, which correlates to how often the sound is pushed to the "For You" pages of those who could be discovering both artists for the first time. *See* Seabrook, *supra* note 26. New listeners encountering the artists and the sound itself helps to heighten success when the duet or original song transitions to streaming services such as Spotify. *See id.*

196. *Thomson v. Larson*, 147 F.3d 195, 203 (2d Cir. 1998).

197. Ktlyn (@ktlynraps), TIKTOK (Feb. 8, 2022), <https://www.tiktok.com/@ktlynraps/video/7062508521748696366> [<https://perma.cc/TPA9-6DCF>] (captioning the TikTok "I won't lie that extra coin don't hurt"). Ktlyn also tagged another user who brands himself as a vocal mixer, the implication being that he contributed to her addition by mixing her vocals. *Id.* Vocal mixers and similar third parties are beyond the scope of this Note because most creators seem to mix their own vocals. However, in the real world, a vocal mixer's contributions may be considered a work for hire, or if not, they may have a claim to some amount of the sound.

re-duetted the duet, acknowledging on his own page that he enjoyed her contribution.¹⁹⁸ Additionally, the duet can be used as a sound by other users on TikTok under the name “Handsome (Remix) (Feat. Ktlyn).”¹⁹⁹ Both Ktlyn and Russ are noted as the creators of the songs.²⁰⁰ This form of credit is common. Stacey Ryan responded to Zailk’s open verse duet of her song by tagging him in a response asking if they should release a full version; Zailk duetted Sadie Jean’s open verse challenge while tagging her in a caption asking, “[h]ow dis sound?”²⁰¹

Copyright law does not require a contract to demonstrate intent to create a joint work; instead, the courts look at the factual indicia.²⁰² The interaction through tags and captions that surrounds duets, while much less formal than written contracts, is still written and clear communication discussing further collaboration.²⁰³ This

198. Russ (@russ), TIKTOK (Feb. 9, 2022), <https://www.tiktok.com/@russ/video/7062766049459981573> [<https://perma.cc/5RY3-QPUF>] (captioning the TikTok “#duet with @ktlynraps butter”).

199. Ktlyn&RUSS, *Handsome (Remix) (Feat. Ktlyn)*, TIKTOK, <https://www.tiktok.com/music/HANDSOMER-Remix-Feat-Ktlyn-7062508568989223727> [<https://perma.cc/NU6M-NMDX>].

200. *Id.* While this “sound” on TikTok could hypothetically be re-duetted by another user under TikTok’s Terms of Service, that new sound would most likely not create a new joint work, but rather a derivative work, as the required intent would not exist unless Ktlyn and Russ were to once again invite others to collaborate with their duet. TikTok’s Terms of Service requires that users have the proper clearances and licenses to post anything on the service. *Terms of Service*, TIKTOK, § 7, <https://www.tiktok.com/legal/page/us/terms-of-service/en> [<https://perma.cc/7LQW-DMCN>] (last updated July 2023). Russ’s intent could be considered to extend to a larger work, but Ktlyn would also need to intend for her contribution to be added to by a third party, which is not the case here. *See Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991) (explaining that an intent to collaborate is the “touchstone” of the inquiry into determining whether or not a work is “joint”). In the flexible online world, however, that situation could appear and would likely result in another joint work. *Id.*

201. *See* Stacey Ryan (@staceyryanmusic), TIKTOK (Jan. 7, 2022), <https://www.tiktok.com/@staceyryanmusic/video/7050354631788023046> [<https://perma.cc/4L64-STJG>]; Zailk (@zailk_), TIKTOK (Dec. 14, 2021), https://www.tiktok.com/@zailk_/video/7041724661679262981 [<https://perma.cc/Y8LW-5KGS>].

202. *Childress*, 945 F.2d at 508.

203. *See, e.g.*, Ryan, *supra* note 201 (captioning the duet “hey @zailk_ do you think we should do a full version”); Zailk, *supra* note 201 (tagging @sadiejean in the caption); Russ, *supra* note 198 (dueting with @ktlynraps); Ktlyn, *supra* note 197 (tagging @russ in the caption). This type of credit system is often not required but is enforced through social norms on TikTok and by TikTok’s encouragement of crediting. *Crediting Creators*, TIKTOK, <https://www.tiktok.com/creators/creator-portal/en-us/foundations-for-success/crediting-creators> [<https://perma.cc/772F-WVX2>].

communication may indeed be pivotal in a factual determination of which duets create joint works; they are clear indications that the original artist intends for that particular duetter to be a collaborator on the work.²⁰⁴ The original creators' invitation to collaborate, the opt-in by the duetting creators, and duetting creators' genuine desire to complement the song and combine their contributions show that there is a clear intention by both creators to merge their contributions into a unitary whole.²⁰⁵ Regardless of creator communication about "releasing" these duet songs, the open verse challenges create individual sounds on TikTok, which, standing alone, are works that could be protected by copyright.²⁰⁶

B. Duets by Creators are Joint Works if the Duetting Creator is Contributing an Original Verse

To be a joint work, each contribution must be independently copyrightable.²⁰⁷ The original work that a creator posts as an open verse challenge is the first work that could be copyrightable.²⁰⁸ First, this means that the underlying composition of that work must be

TikTok allows creators to "give credit" for a video's concept to the original creator through its crediting tool, which links the original video to the new video; TikTok also highly encourages creators giving credit where it is due by tagging the original creator or duetting their video. *Id.* TikTok expressly states on its website that it wants to nurture and grow the culture of attribution on its application by spreading the prevalence of this type of attribution. *Id.*

204. *Childress*, 945 F.2d at 505. This contrasts with other duets that the original artist simply ignores and does not interact with, which most likely would not satisfy the requisite intent.

205. *Id.*; see also *Corwin v. Quinonez*, 858 F. Supp. 2d 903, 910 (N.D. Ohio 2012) (citing step one of the *Childress* framework is the intention of both authors to collaborate); *BTE v. Bonnacaze*, 43 F. Supp. 2d 619, 622 (E.D. La. 1999) (citing *Childress*, 945 F.2d at 505).

206. See *Zai1k (@Zai1k_)*, *IG Spoon in My Face*, TIKTOK, <https://www.tiktok.com/music/Zai1k-On-IG-Spoon-in-My-face-7041724613264493317?lang=en> [https://perma.cc/SDZ9-FG22] (showing that the sound of Zai1k's duet to Stacey Ryan's open verse challenge currently has been used in over 5,000 videos by other creators); *Zai1k (@Zai1k_)*, *Original Sound*, TIKTOK, <https://www.tiktok.com/music/original-sound-7049149317206182703?lang=en> [https://perma.cc/2CM6-2YP8].

207. See *Childress*, 945 F.2d at 506–07 (outlining the requirements for joint works); see also *Corwin*, 858 F. Supp. 2d at 910 (citing step two of the *Childress* framework that each piece of a joint work must be copyrightable); *BTE*, 43 F. Supp. 2d at 622 (citing *Childress*, 945 F.2d at 505).

208. For the purposes of this Note, I assume that the creator who posts the song on TikTok is the sole author and owner of the work and any underlying copyright.

original.²⁰⁹ While originality very heavily depends on the song that a creator posts, because many creators draw open verse challenge songs from pre-existing music, most would still meet the very low bar for originality—having a “modicum of creativity.”²¹⁰ The underlying composition, the musical work, of these TikTok sounds is most likely original, as their freshness is what gains them traction with the TikTok generation.²¹¹ Therefore, the originality requirement is most likely met by these songs’ musical composition and the sound recording.

Second, both works would need to be fixed in a tangible medium of expression.²¹² The musical compositions and sound recordings are fixed when they are recorded into the phonorecords used as the sounds on TikTok.²¹³ When the creator, the author of both the musical composition and the sound recording, records their composition into a sound recording, they act to do two things: (1) the recording of the musical composition fixes the musical composition in a tangible medium which is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration;” and (2) the sound recording is fixed through its creation as the master.²¹⁴ For other creators to be able to duet these sounds, the work would have to be fixed in a tangible medium that is stable enough for the creators to perceive or reproduce

209. 17 U.S.C. § 102.

210. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). Very few, if any, of these songs entirely lack creativity; they usually rise to at least a notable amount of creativity in their composition. U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 9 (section 308.2).

211. Yao, *supra* note 182 (stating that TikTok has changed music creation because remixing and repurposing originals results in a multitude of iterations). Additionally, while there is some content stealing on TikTok, when a creator’s music becomes popular enough to gain duets from their videos, the creators of those duets are also visible enough to be called out for any borrowing or outright stealing they might have done. *See id.*

212. 17 U.S.C. § 102.

213. *Id.* § 101. Most TikTok artists record their music outside of TikTok and then upload it to the application itself.

214. *Id.* §§ 101–102. Some creators may directly fix these sound recordings on TikTok, but most musical creators first record, edit, and mix their segments to create better sound quality. Yoni Leviatan, *Making Music: The 6 Stages of Music Production*, WAVES (May 18, 2021), <https://www.waves.com/six-stages-of-music-production> [<https://perma.cc/2G2N-4448>]. For those who directly record the sound to TikTok with their video, rather than upload it separately, the analysis would need to include a consideration of the motion picture created through the TikTok, rather than just the sound itself.

these sounds for their own duet.²¹⁵ TikTok plays these sounds as many times as a user would like to listen to them, making it a stable tangible medium that allows others to perceive and reproduce these sounds.²¹⁶

Third, these songs must be works of authorship and fall within one of the categories protected by the Copyright Act.²¹⁷ These creators are human authors of the works and therefore fall within the protection of copyright law.²¹⁸ Both musical compositions and sound recordings are explicitly protected forms of work under copyright law.²¹⁹

The duetting creator's addition must also be copyrightable to establish a valid joint work.²²⁰ This analysis always depends on the specific duet itself. Many popular duets are original.²²¹ There are exceptions, of course, such as when users have duetted in a monologue from a movie or a television show to complete the open verse.²²² However, if we take Ktlyn's contributions, which are similar to duets that have become popular, the analysis becomes relatively straightforward. Ktlyn is a human author of an original musical composition, which she has fixed by recording it in TikTok, just as the

215. See 17 U.S.C. § 101 (defining when a work is fixed in a tangible medium); *Leviatan*, *supra* note 214 (stating that a sound is tangible because it is recorded, unlike live sounds which disappear once they are over).

216. See 17 U.S.C. § 101 (explaining that a fixed work must be “communicated for a period of more than transitory duration”). The “sounds” within the video synchronize but exist as distinct work from the video content. *Id.* (defining phonorecords as the sound and not the accompanying visuals).

217. *Id.* § 102(a)(2), (a)(7).

218. *Id.* § 102; U.S. COPYRIGHT OFF., *supra* note 122, ch. 300, at 7 (section 306). This may change soon with AI being used to compose and create songs.

219. § 102(a)(2), (a)(7).

220. *Childress v. Taylor*, 945 F.2d 500, 506–07 (2d Cir. 1991); see also *Corwin v. Quinonez*, 858 F. Supp. 2d 903, 910 (N.D. Ohio 2012) (citing step two of the *Childress* framework that each piece of a joint work must be copyrightable); *BTE v. Bonnacaze*, 43 F. Supp. 2d 619, 622 (E.D. La. 1999) (discussing the inseparable contributions of authors to create a joint work).

221. See *#openversechallenge*, TIKTOK, <https://www.tiktok.com/tag/openversechallenge?lang=en> [<https://perma.cc/LAG2-ZBXY>] (linking all duets that use the hashtag *#openversechallenge*, many of which are original).

222. Mae, *supra* note 41. Maria Mae's duet of Lauren Spencer Smith's song *Fingers Crossed* perfectly fits a monologue from *Grey's Anatomy* into the space that Smith leaves for a verse to be placed, overlaying the TV show's sound onto Smith's track. *Id.* This would be an example of a duet that is not a joint work because Maria Mae does not have a license to use that scene from *Grey's Anatomy*. *Id.* This duet might be derivative work if Maria Mae had a license to use the scene; however, discussion of derivative works is beyond the scope of this Note.

original creator did.²²³ Ktlyn's verse uses the same tune as Russ's song and plays off of Russ's theme of money making him more attractive.²²⁴ The rhythm of her rapping has a slightly different tempo, and the lyrical composition of the verse is creative enough to easily overcome the low bar for originality.²²⁵ Additionally, as with the analysis for the original composition, Ktlyn's musical composition of her verse was fixed as soon as she recorded her verse and posted it on TikTok as a duet with Russ's open verse challenge.²²⁶ Therefore, these TikTok duets should be considered joint works, as they meet both the intent and independent copyrightability requirements.

C. Duets by Creators are Most Likely Not Derivative Works as They Do Not Meet the Required Elements for Derivative Works

For a TikTok duet to be a derivative work, the duet must be some type of reproduction of the original creator's sounds, with the original creator's permission.²²⁷ Duetting creators are not recasting, transforming, or adapting these original creators' songs, but rather they are simply adding in their own additions to a work in progress.²²⁸ Admittedly, some open verse duets could be considered derivative works when the intention to merge each creator's contributions into a greater work is unclear or nonexistent.²²⁹ Original artists could protect themselves and ownership of their works by creating songs in their entirety without leaving room for open verse challenge duets and offering the chance to contribute to complete versions of their songs as part of open verse challenges.²³⁰ These additions do not add

223. See Ktlyn, *supra* note 198 (duet author); Russ, *supra* note 198 (original author).

224. Ktlyn, *supra* note 198; see Russ, *supra* note 198.

225. Ktlyn, *supra* note 198; see Russ, *supra* note 198.

226. Ktlyn, *supra* note 198; see Russ, *supra* note 198; 17 U.S.C. § 101 (defining a work "fixed" in a tangible medium of expression as "when [the work's] embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration").

227. 17 U.S.C. § 101. A good illustration of sampling would be Ariana Grande's *7 Rings* which samples *My Favorite Things* from *The Sound of Music* and properly used the sampled song through licensing. Rania Aniftos, *Ariana Grande's '7 Rings' & 4 Other Songs that Sampled 'The Sound of Music'*, BILLBOARD (Jan. 18, 2019), <https://www.billboard.com/music/music-news/ariana-grandes-7-rings-4-other-songs-that-sampled-the-sound-of-music-8494149> [https://perma.cc/U5T4-2HUH].

228. 17 U.S.C. § 101.

229. NIMMER & NIMMER, *supra* note 153, § 6.05.

230. *Id.*

nontrivial expressive variation that make the duet distinguishable from the underlying work; in fact, most duets aim to not significantly change the original work so as to keep the original work's integrity.²³¹ While sampling is common in the music world, TikTok duets are not the same because they are the creation of an entirely new work with two contributions that are not supposed to exist on their own.²³² The duets are created by two creators with the intention that their independently copyrightable works be merged into one unitary whole, emerging as a joint work, which is entirely different from the practice of sampling.²³³

CONCLUSION

The duets that result from open verse challenges, where the song is intended for an open verse challenge and when the duetting creator adds in their own original verse are likely protectable as a joint work under the Copyright Act of 1976.²³⁴ Considering these duets as joint works would result in different legal rights for the creators, which shifts creators' money-making power.²³⁵ The ability to use music as money-generating work is especially important for creators who rely on the money that they make from social media platforms.²³⁶

Treating the creators as joint authors would allow both to license the duet, just not exclusively when acting independently.²³⁷ However, both creators would be required to pay the other for their fair share of the licensing.²³⁸ Therefore, when either creator chooses to license the duet

231. See, e.g., Young, *supra* note 43 (discussing *Handsome*); Grant, *supra* note 49 (discussing *Remember (Remix)*); Seabrook, *supra* note 26 (discussing *Don't Text Me When You're Drunk*).

232. See PASSMAN, *supra* note 107, at 250; Tasev, *supra* note 106, at 11. Some duets are of songs that do exist on their own, but the sound on TikTok itself would not be used on its own without someone else duetting it. See PASSMAN, *supra* note 107, at 250; Tasev, *supra* note 106, at 11.

233. PASSMAN, *supra* note 107; see Young, *supra* note 43 (discussing Ktlyn's duet with Russ on *Handsome*); Grant, *supra* note 49 (identifying Russ and Knox's duet as a joint work); Seabrook, *supra* note 26 (describing how duets are made).

234. See *Childress v. Taylor*, 945 F.2d 500, 505–07 (2d Cir. 1991) (explaining the requirements for joint works); see also 17 U.S.C. §§ 101–102 (defining joint works and outlining copyright protection).

235. See *Davis v. Blige*, 505 F.3d 90, 98 (2d Cir. 2007) (noting that joint authors have equal interests in the works and are subject to their share of any profits from the work).

236. Veronica Irwin, *TikTok Now Lets Musicians Make Actual Money from Going Viral*, PROTOCOL (Mar. 9, 2022), <https://www.protocol.com/bulletins/tiktok-soundon-viral-music-royalties> [<https://perma.cc/5ZPB-MVM8>].

237. *Davis*, 505 F.3d at 98.

238. *Id.*

to earn money, both creators have a right to that income, no matter their contribution.²³⁹ This creates a different level of control over the work for creators who have taken equal part in the duet's success than if the duets were derivative works.²⁴⁰ If the duets were considered to be derivative works, each duet would require a license to actually be created legally.²⁴¹ Creating music through apps such as TikTok is much more fluid than the traditional music industry scheme of licensing to sample other artists on records.²⁴² In fact, the fluidity of this creation without the threat of constant lawsuits is most likely what allows for such quick turnaround for these duets and the ease with which hits spring from TikTok.²⁴³

The question of how to protect these works is important because creators are often smaller fish in the music industry, which leaves them open to being exploited by larger players.²⁴⁴ Considering these duets as joint works creates a legal protection for both the original creator and the duetting creator; this protection allows for more security in creators' ability to play in the creative spaces of TikTok without the concern of the original creators taking their compositions and simply reusing them in a new recording with a different, perhaps more well-known artist who may help to boost sales. Joint authorship allows for legal protection of each creator's contributions to the online creative space without stifling creative expression.

239. *Id.*; *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067–68 (7th Cir. 1994).

240. *Compare Davis*, 505 F.3d at 98 (noting that both joint authors may use or license their work of joint authorship however they want, assuming proper allocations of any profits), *with* 17 U.S.C. § 103(b) (noting that the author of a derivative work only has control over the original parts of their work that do not incorporate the preexisting material used).

241. 17 U.S.C. § 103(b).

242. Tasev, *supra* note 106, at 11; PASSMAN, *supra* note 107, at 292.

243. Yao, *supra* note 182.

244. *See id.* (discussing record labels attempting to sign TikTok artists).