

NOTE

**WHO CONTROLS THE DANCE:
COPYRIGHT IN THE WORLD OF CHOREOGRAPHY**

*Gabrial Mitchell**

I. INTRODUCTION.....383

II. BACKGROUND.....383

 A. THE EVOLUTION OF DANCE: DANCE HISTORY, CHOREOGRAPHY AND ITS PROCESS.....383

 B. PROTECTION OF CHOREOGRAPHY: COPYRIGHT LAW IN THE UNITED STATES.....386

 1. *The Copyright Act of 1976*.....388

 2. *The Copyright Act and “Choreographic Works”*392

 C. ISSUES SPECIFIC TO DANCE WITHIN THE COPYRIGHT ACT OF 1976.....393

 1. *“Choreographic works”*395

 2. *“Originality”*398

 3. *“Expression versus Idea”*400

 4. *“Substantial Similarity”*401

 5. *“Author or Owner of the Work”*.....402

III. FIXATION – ANALYSIS405

 A. FIXATION AND DANCE405

 B. THE ROLE OF THE FIXATOR407

IV. CONCLUSION.....409

V. APPENDIX410

LIST OF FIGURES

1. Figure 1. The Symbols Used to Identify the Different Body Areas410

2. Figure 2. Example of A Labanotation Score for Four Counts, Which Would Range from About Two to Four Seconds411

* © 2018 Gabrial Mitchell. Gabrial Mitchell graduated with honors from The George Washington Law School in 2018. Prior to law school, Ms. Mitchell graduated from Kenyon College with a B.A. in Anthropology and Dance. She would like to thank her family for their constant support and the Publication Board of the AIPLA Quarterly Journal for their work on this publication.

*There is a vitality, a life force, an energy, a quickening that is translated through you into action, and because there is only one of you in all of time, this expression is unique. And if you block it, it will never exist through any other medium and it will be lost.*¹

— Martha Graham

*You have to love dancing to stick to it. It gives you nothing back, no manuscripts to store away, no paintings to show on walls and maybe hang in museums, no poems to be printed and sold, nothing but that single fleeting moment when you feel alive.*²

— Merce Cunningham

¹ AGNES DE MILLE, *MARTHA: THE LIFE AND WORK OF MARTHA GRAHAM* 264 (1991).

² *Fond Farewells: Merce Cunningham*, TIME, http://content.time.com/time/specials/packages/article/0,28804,1946375_1946448_1946418,00.html [<https://perma.cc/7EZG-V3M8>] (last visited July 8, 2018).

I. INTRODUCTION

Dance has been the “odd child out” when it comes to artistic works, often struggling to be recognized as a legitimate art form throughout history.³ This is no more evident than in its lack of acknowledgment by United States law. Only in the last 40 years has it been recognized as an art protected by U.S. copyright law; under the Copyright Act of 1976, “choreographic works” was added to the list of covered artistic works.⁴ However, this newly founded legal protection did not come without caveats. This Note will discuss several of the copyright concepts that do not perfectly align with the ephemeral and ever-changing definition of “dance,” focusing primarily on the issue of fixation. While there are forms of fixation applicable to dance, such as filming and Labanotation,⁵ there are several issues with these “fixed” forms that ultimately create a separate artistic work from the dance created by the choreographer, and should possibly gain its own copyright protection. This Note proposes that dance should be compared to other artistic forms when possible, but should also be recognized as a unique art form that does not perfectly align with current copyright law and warrants its own rules.

II. BACKGROUND

While dance as an art form has been around for centuries, its involvement in the legal realm is a much more recent development.⁶ This Section of the Note addresses the history of dance as an art form, the emergence of copyright protection for choreography in the United States, and the discrepancies between traditional copyright concepts and the practicalities of choreography.

A. THE EVOLUTION OF DANCE: DANCE HISTORY, CHOREOGRAPHY AND ITS PROCESS

Dance and its many forms have evolved drastically throughout history. While it began as a communicative and social concept, dance began to take its

³ Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 288 (1984).

⁴ Copyright Act of 1976, Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2545 (1976).

⁵ Labanotation is a notation system created by Rudolf Laban in the early 20th century for recording and analyzing human movement. See ANN HUTCHINSON GUEST, *CHOREO-GRAPHICS: A COMPARISON OF DANCE NOTATION SYSTEMS FROM THE FIFTEENTH CENTURY TO THE PRESENT* 1-5 (4th ed. 1989).

⁶ See *infra* Section II.B.

place as an artistic form in the European courts.⁷ There, dance was confined to a strict definition, one that required story lines and immense training.⁸ While this strict definition of what constituted a “dance” stood for several centuries, the 20th and 21st centuries have seen a major expansion through the modern dance movement where the concepts of who could be considered a dancer and what could be considered dance were expanded, with the modern choreographers playing with everyday movement and people.⁹ This expansive trend of inclusiveness also extended to choreographers, where at first only a select few elites could create dances in accordance with the styles recognized today.¹⁰ Furthermore, since the turn of the century and the expansion of technology, many dances have been created through computer programs, which raises novel questions of who or what can be a choreographer.¹¹

Because dance is an ephemeral art, one that only lives in one moment of time, there have been many attempts to record choreography to preserve it for the future.¹² There have been different forms of notation memorializing dance over

⁷ See generally RODERYK LANGE, *THE NATURE OF DANCE* (1976) (discussing the role that European monarchs, such as Louis XIV of France, played in promoting dance as an art form).

⁸ See *id.* at 6–7 (noting the focus on “allegoric stories” and the relative complexity of ballets performed at court).

⁹ See Krystina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies Over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 144 (2004) (citing JACK ANDERSON, *BALLET AND MODERN DANCE: A CONCISE HISTORY* 166–68 (1992)) (“American dance claimed to have found its true voice through modern dance, which repudiated all forms of classical ballet under the theory that artistic individualism was supreme.”); WALTER TERRY, *BALLET GUIDE: BACKGROUND, LISTINGS, CREDITS, AND DESCRIPTIONS OF MORE THAN FIVE HUNDRED OF THE WORLD’S MAJOR BALLETS* 11–12 (1959).

¹⁰ See Lopez de Quintana, *supra* note 9, at 140 (noting the limited number of choreographers in historical ballet due to the lack of financial support and limitation of choreographed works to aristocratic functions).

¹¹ See Jennifer Dunning, *How to Tell the Computer from the Dance; Technology Now Contributes to Choreography Instead of Just Recording It*, N.Y. TIMES (Feb. 23, 1999), <https://www.nytimes.com/1999/02/23/arts/tell-computer-dance-technology-now-contributes-choreography-instead-just.html> [<https://perma.cc/48T9-D9NL>] (discussing various innovations in choreographic technology and some of the questions these innovations raise as far as the future of choreography).

¹² See GUEST, *supra* note 5, at 1–5 (discussing several different sources created

approximately five centuries but most failed because they only worked for certain genres of dance, such as ballet vocabulary.¹³ Labanotation is the only form of notation still prominent because of its ubiquitous vocabulary, created by Rudolf Laban in the early 20th century and expanded by the Dance Notation Bureau.¹⁴ Today, labanotation is the most prominent way to license and recreate choreographic works because it is not connected to a specific style of movement.¹⁵ The Labanotation system is based on a set group of symbols representing the many facets of movement such as parts of the body, directions, speed, dynamics, and relationship to other dancers.¹⁶ The Labanotation technique is intricate and takes several years of practice and certification to achieve, which is why there are a limited number of experts throughout the world.¹⁷ These experts create their notation by witnessing the choreography and, if possible, discussing the work with the choreographer, but then it is up to the notator to make the creative decisions on how to represent the movement through the symbols.¹⁸ Film has also become one of the most prominent forms of capturing dance with the expansion

over time for the purpose of a written preservation of choreographed dance).

- ¹³ *See id.* at 4 (describing the history of dance notation and the various failed systems that were created as each was tied to the specific dance style of their time period).
- ¹⁴ *See id.* (explaining the use of labanotation in modern day, the role of Laban, and the role of the Dance Notation Bureau in the expansion of its use since 1940).
- ¹⁵ *See id.* (expounding on the benefits of labanotation because it “provides for movement a level of accuracy and flexibility which music notation has yet to achieve”).
- ¹⁶ *See id.* at 12–13 (stating the categories of movement motivation and their analysis); Figures 1 & 2.
- ¹⁷ *See* GUEST, *supra* note 5, at 12–15 (demonstrating the intricacy of the Labanotation technique with its various moving parts); *Studying Labanotation*, DANCE NOTATION BUREAU, <http://www.dancenotation.org/studying/frame0.html> [<https://perma.cc/V7UB-HQLM?type=image>] (last visited Sept. 25, 2018).
- ¹⁸ *See generally, e.g.*, GUEST, *supra* note 5, at 12–15 (acting as a guide for learning Labanotation, which is used for teaching the notator how to create the written record of the choreographed work through a set of symbols).

of technology and is generally seen to be a cheaper alternative to other forms of preserving choreography.¹⁹

Despite significant shifts in the world of dance throughout the past few centuries, certain elements have remained the same. For example, dance has constantly been created for the enjoyment of the observer over the participant, and there has always been a strong connection between the choreographer and the dancer.²⁰ Notably, the general process of creating a dance has remained the same: a choreographer gains inspiration and works with a dancer (either themselves, another individual or a group of individuals) to create the movement that speaks to that inspiration, and chooses the order and timing of those movements.²¹ A dance is then officially complete when the choreographer is set on the movement and the movements are set in the dancer's memory and body; this mark of completion sets dance apart from other art forms, which require a physical copy of the work to be considered complete.²²

B. PROTECTION OF CHOREOGRAPHY: COPYRIGHT LAW IN THE UNITED STATES

According to U.S. Constitution Article 1, § 8, Congress "shall have Power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."²³ Under this section, Congress is empowered to protect artistic

¹⁹ See Bethany M. Forcucci, Note, *Dancing Around the Issues of Choreography & Copyright: Protecting Choreographers after Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 24 QLR 931, 943 (2005) ("Audiovisual preservation of choreography, usually by videotape, is less expensive than dance notation, and is therefore a more practical method of fixation for some choreographers.").

²⁰ See Martha M. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 NEW ENG. L. REV. 227, 229 (1981) (noting the purpose of choreographic works are for the benefit of the observer and the interplay between the choreographer and the performer).

²¹ See *id.* at 234 ("The intellectual act of creations occurs when movements are conceived by the choreographer and directed into the trained bodies and intellects of the dancers. . . . Only the thoughts and artistic concepts of the choreographer are manifested.").

²² See *id.* ("When the choreographer is satisfied that the dancers in movement express his or her artistic ideas, the choreography, in the language of the dance world, is 'set.'").

²³ U.S. CONST. art. I, § 8, cl. 18.

works through the copyright system.²⁴ The first Congress used this power to implement the Copyright Act of 1790.²⁵ The Act was limited in its scope, protecting only American authors of maps, charts, and books, and granting them only the right to print, re-print and publish their work for a 14-year period with the ability to renew the protection for another 14 years.²⁶ Revisions to the Copyright Act were made in 1831, mainly to increase the years of copyright protection, and later in 1870 to change the location of copyright registrations of the Library of Congress.²⁷

The first monumental change to copyright law came with the third revision under the Copyright Act of 1909 when the scope of protection was extended to any “works of authorship”²⁸ as well as another increase in the extension of copyright duration to 28 years.²⁹ While neither dance nor choreography was listed as a work of authorship, dance was understood to be a category within “dramatic work.”³⁰ However, interpreting choreography as a dramatic work limited the protection of dances to dances of a “dramatic” nature, meaning they had to include a storyline, characters, or depict a particular

²⁴ *Id.*

²⁵ *E.g., Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RESEARCH LIBRARIES, <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.WIVDeHeZOt8> [<https://perma.cc/HR8X-4ADW>] (last visited July 2, 2018).

²⁶ Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790).

²⁷ *See A Brief History of Copyright Law in the United States*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/timeline/> [<https://perma.cc/SH72-XC3J>] (last visited July 1, 2018) (“Extending the initial period of protection from 14 years to 28 years.”).

²⁸ *See Copyright Timeline*, *supra* note 25. The list of protected works included: “Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations; Periodicals, including newspapers; Lectures, sermons, addresses, prepared for oral delivery; Dramatic or dramatico-musical compositions; Musical compositions; Maps, Works of art; models or designs for works of art; Reproductions of a work of art; Drawings or plastic works of a scientific or technical character; Photographs; Prints and pictorial illustrations.” Copyright Act of 1909, Pub. L. No. 60-349, § 5, 35 Stat. 1075, 1076-77 (1909).

²⁹ *See A Brief History of Copyright Law*, *supra* note 27.

³⁰ Lopez de Quintana, *supra* note 9, at 147 (citing Copyright Act of 1909, § 5, 35 Stat. at 1075).

emotion.³¹ Accordingly, abstract dances were not protected under the 1909 Act.³² Congress consistently rejected extending copyright protection to such dances because they did not see them as pertaining to a “useful art” as specified in the Constitution.³³ This became a more prevalent issue with the rise of modern dance but was not addressed until the most recent Copyright Act was passed in 1976, which added choreographic works to the list of protected works.³⁴

1. *The Copyright Act of 1976*

The Copyright Act of 1976 (“the 1976 Act”) was passed primarily due to technological advances in the beginning half of the 20th century that would affect the contours of copyright law.³⁵ The 1976 Act preempted all past U.S. Copyright laws and implemented several changes.³⁶ These changes included extending the term of protection to the life of the author plus 50 years, and 75 years for works for

³¹ Lopez de Quintana, *supra* note 9 at 147–48 (citing *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 160 (2d Cir. 1986)).

³² *See id.* at 148 (explaining that abstract dances were not copyrightable until the 1976 Copyright Act and that therefore the 1909 Act did not cover “[m]any modern and contemporary works”).

³³ *See* Kathleen Abitabile & Jeanette Picerno, *Dance and The Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 CAMPBELL L. REV. 39, 41 (2004) (“Congress consistently rejected any legislation that extended copyrights to choreography, since it never managed to fall into this ‘useful’ category.”).

³⁴ *See* Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 272 (1999) (citing 17 U.S.C. § 102(a)(4) (1994)) (noting that Congress allowed choreographic works to be part copyrightable material).

³⁵ Copyright Act of 1976, Pub. L. No. 94-553, §§ 101 et seq., 90 Stat. 2541 (1976). Congress also passed the 1976 Act due to the approaching U.S. adherence to the Berne Convention. *See Copyright Timeline, supra* note 25. The Berne Convention, which is the Convention for Protection of Literary and Artistic Arts, was created in 1881 for mutual recognition of copyright protection between countries. When the United States decided to join, they realized they would need to change their copyright practices to better align with the international practices. *See id.* (“It was felt that the statute needed to be amended to bring the U.S. into accord with international copyright law, practices, and policies.”).

³⁶ Copyright Act of 1976, 17 U.S.C. § 301.

hire.³⁷ The 1976 Act also significantly changed other aspects of U.S. copyright law, including the scope of protection and the subject matter of works protected.³⁸

Section 102 of the 1976 Act states that, “Copyright protection subsists, in accordance with this title, 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.”³⁹ This Section presents three requirements for any artistic work to be eligible for federal copyright protection: (1) fixation, (2) originality and (3) a work of authorship.⁴⁰

First, the work must be “fixed,” requiring the work be embodied “in a copy or phonorecord, by or under the authority of the author” and be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁴¹ For example, a work that is inherently changeable, such as a work of nature, typically cannot gain copyright protection because it is not considered fixed and unaltered for an adequate amount of time.⁴² Thus, a work must be sufficiently stable to warrant copyright protection.⁴³ The purpose of fixation is to provide notice of the copyright and preserve the artistic work.⁴⁴

³⁷ Copyright Act of 1976, § 302, 90 Stat. at 2572.

³⁸ See *Copyright Timeline*, *supra* note 25 (noting that the 1976 Act involved the “scope and subject matter of works covered” as well as a revision of other parts of copyright law, such as copyright term and the fair use doctrine).

³⁹ 17 U.S.C. § 102(a) (2012).

⁴⁰ *Id.*

⁴¹ *Id.* § 101.

⁴² See *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 204–05 (7th Cir. 2011) (stating that an artistic arrangement of flowers as a garden could not be copyrighted because of the nature of flowers to change over their life cycle and from season to season, therefore never being appropriately fixed to be able to receive copyright protections).

⁴³ See Evan Brown, *Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law*, 10 WASH. J.L. TECH. & ARTS 17, 19 (2014) (quoting 17 U.S.C. § 101).

⁴⁴ See Lydia Pallas Loren, *Fixation as Notice in Copyright Law*, 96 B.U. L. Rev. 939, 940 (2016) (explaining fixation as the “‘notice’ of what can be claimed as protected by the federal copyright law”).

Second, the work must be an original work created by the author.⁴⁵ A work is original if it is independently created by the author and possesses at least some minimal degree of creativity.⁴⁶ A work may be original if it closely resembles another work, so long as the similarity is not created through copying.⁴⁷ If a work is based upon a preexisting work in some way but adds its own level of creativity, the work can gain copyright protection as a “derivative work” for the original pieces in the work, if those pieces satisfies the “modicum of creativity” requirement.⁴⁸

The 1976 Act establishes that copyright ownership initially vests in the author; however, the Act does not define “author,” leaving room for interpretation as to who or what may qualify as an author.⁴⁹ Copyright vests in a “sole author” when one person creates an original work, the most well understood version of ownership.⁵⁰ A work can also be a work for hire or a work created by multiple authors.⁵¹ A work for hire is a work created by an employee for the use of the employer; the initial ownership vests in the employer.⁵² An artistic piece can also be defined as a work for hire if another person commissions the work and the

⁴⁵ 17 U.S.C. § 102; see Jodi L. Collova, *Beyond Bikram: Stretching the Definition of Choreographic Works*, 1 LEGAL INFO. REV. 75, 81 (2015–16) (explaining this requirement as “the choreographer must have contributed some independent creative effort to the work”).

⁴⁶ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁴⁷ See *id.* (stating that a close similarity in works does not mean that a work is not original and must be the result of copying).

⁴⁸ *Id.* at 346 (quoting *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)) (explaining the “modicum of creativity requirement” for original works deserving of copyright protection); see 17 U.S.C. § 101 (defining a derivative work and elucidating that such works can be original works therefore deserving of copyright protection).

⁴⁹ 17 U.S.C. § 201 (2012).

⁵⁰ See *Copyright Basics*, <http://www.copyrightkids.org/copyrightbasics.html> (“Usually, you can tell who the author of a work is -- the person who created it. But sometimes, it is not quite that easy.”).

⁵¹ See 17 U.S.C. § 101 (defining both the terms “joint work,” which is created by multiple authors, and “work made for hire”).

⁵² See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989) (quoting 17 U.S.C. § 201(b)) (“If the work is for hire, ‘the employer or other person for whom the work was prepared is considered the author’ and owns the copyright.”).

ownership vests in that person, but this arrangement requires a written agreement and only applies to certain types of work.⁵³ A joint work is when two or more authors create a piece with the intention that their work will be combined into an inseparable piece, and the Act states that all joint authors own the work equally.⁵⁴ These different formations of authorship allow more than one person to hold rights in an artistic piece.

If a work meets the three aforementioned requirements, copyright protection is granted, and the owner of the copyright is entitled to action against infringement of their work.⁵⁵ Copyright infringement occurs when someone violates one of the exclusive rights of the copyright holder under §§ 106–122, which includes reproducing, distributing, performing, publicly displaying, or making a derivative work without the permission of the copyright holder.⁵⁶ If one of the exclusive rights are violated, a copyright owner may bring action against the infringer for different remedies, including injunctions against the infringing work, disposition of infringing articles, damages and profits, and costs and attorney's fees.⁵⁷

The 1976 Act also establishes exceptions to copyright protection and affirmative defenses for copyright infringement. For instance, under § 102(b), protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery,” no matter its form.⁵⁸ Several other

⁵³ 17 U.S.C. § 101 (including in the definition of work for hire “collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire . . . ‘supplementary work’ is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an ‘instructional text’ is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.”).

⁵⁴ *Id.* §§ 101, 201(a).

⁵⁵ *Id.* § 501(b).

⁵⁶ *Id.* § 501(a).

⁵⁷ *Id.* §§ 502–505.

⁵⁸ *Id.* § 102(b).

exceptions are listed in the first chapter of the Act, as well as affirmative defenses to infringement, such as the fair use doctrine, which allows use of copyrighted material for purposes such as criticism or scholarship and the use of works for face-to-face teaching.⁵⁹ These are just a few of the many terms and requirements that were officially defined within the Copyright Act of 1976 for the first time, expanding and clarifying the federal copyright law of the U.S.

2. *The Copyright Act and "Choreographic Works"*

Section 102 includes an exhaustive list of categories that meet the definition of "works of authorship," and the fourth category is "pantomimes and choreographic works."⁶⁰ For the first time in American copyright history, choreography, including abstract dances without dramatic content, were deemed a separate form of protected art.⁶¹ The legislative history suggests that choreographic works were added for several reasons, including the shift in dance culture to better embrace abstract work and the importance of protecting and compensating choreographers for their work.⁶² However, the practical reason was that changes in technology made Congress believe that fixation of dance would be fairly simple.⁶³ Section 106 of the Act also lists the exclusive rights given to the owners of any copyrighted work and breaks down the exclusive rights given to

⁵⁹ 17 U.S.C. §§ 107–112 (2012).

⁶⁰ *Id.* § 102(a) (other categories listed are "literary works; musical works, including any accompanying words dramatic works, including any accompanying music . . . pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works").

⁶¹ *See Swack, supra* note 34, at 274–75 (noting that choreography of abstract dance was not covered until the copyright law revision in 1976, which is the source of § 102).

⁶² *See* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GEN. REVISION OF THE U.S. COPYRIGHT LAW 17 (Comm. Print 1961).

⁶³ *See id.* ("Fixation is now feasible in the form of systems of notation recently developed or in the form of motion pictures.").

particular works of authorship.⁶⁴ Rights specifically pertinent to choreography include the right to perform and the right to display the work publicly.⁶⁵

While copyright protection was finally extended to choreography, the Act still presented certain requirements for the work to be eligible for registration; the work must be a “choreographic work”, original, and fixed in a tangible medium.⁶⁶ These three requirements, discussed later in this Note, present substantial issues for choreographers which have left the impact of the Act on the dance community questionable at best.

C. ISSUES SPECIFIC TO DANCE WITHIN THE COPYRIGHT ACT OF 1976

Because dance is a new concept to U.S. copyright protection and was added many years after other art forms, some traditional copyright concepts do not apply to a choreographic work.⁶⁷ Furthermore, because of its relative novelty to the federal legal protection, very little case law or legal writings relating to

⁶⁴ 17 U.S.C. § 106 (including among the exclusive rights given to all works of authorship the right “to reproduce the copyrighted work in copies or phonorecords; to prepare derivative works based upon the copyrighted work; to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”).

⁶⁵ *Id.* (“[I]n the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.”); see COPYRIGHT LAW REVISION, *supra* note 63, at 28, 150 (describing how the right of public performance of works fall under the copyright rights, specifically regarding choreographic works); see Swack, *supra* note 34, at 281–82 (stating the pertinent rights protected under copyright law and that they are protected as well for choreographic works).

⁶⁶ See generally Lauren B. Cramer, *Copyright Protection for Choreography: Can It Ever Be ‘En Pointe’?*, *Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography*, 1 SYRACUSE J. LEGIS. & POL’Y. 145, 147 (1995) (quoting 17 U.S.C. § 102(a)(4) (1976)) (discussing the requirements of the 1976 Copyright Act for registration of choreographic works).

⁶⁷ See Traylor, *supra* note 20, at 228 (suggesting that the use of the old language from copyright protections are “incongruous when applied to the customs and usages of the art forms of choreography and pantomime”).

choreographic copyright exist.⁶⁸ Confusion has ensued over how copyright truly protects choreographers and their work.⁶⁹ As a result, choreographers often do not register for or rely on copyright law to protect their work.⁷⁰ Below, this Note discusses several of the major issues that have been subject to debate since the enactment of the 1976 Act and how the Act works in relation to dance. The seminal case pertaining to choreographic works post enactment of the 1976 Act is *Horgan v. MacMillan*.⁷¹ The case involved the estate of George Balanchine, one of the most influential choreographers of American ballet.⁷² Balanchine's estate argued that his piece "Nutcracker" had been infringed by the publishers and authors of a book that included photographs depicting the dance.⁷³ The Second Circuit held that the correct test for copyright infringement of choreography, just as with other art forms, was whether there was "substantial similarity" between the photographs and the dance itself.⁷⁴ In this decision, the Court attempted to answer some of the

⁶⁸ See Julie Van Camp, *Copyright of Choreographic Works*, ENT., PUB. AND ARTS HANDBOOK 59, 59 (1994), <http://web.csulb.edu/~jvancamp/copyrigh.html> [<https://perma.cc/E563-ST6B>] (stating that only one case for the infringement of a copyrighted choreographic work had reached the Federal courts at the time).

⁶⁹ See Katie Lula, *The Pas De Deux Between Dance and Law: Tossing Copyright Law into The Wings and Bringing Dance Custom Centerstage*, 5 CHL.-KENT J. INTELL. PROP. 177, 186 (2005) (explaining that choreographers do not understand how to take advantage of the protections offered by copyright law given their financial situation and existing rights within the dance community).

⁷⁰ See *id.* at 180 ("In 1980, only sixty-three of the 464,743 registered copyrighted works were choreographic works. After 1982, when only 132 of the 468,149 registered copyrighted works were choreographic works, the Copyright Office ceased publishing in its annual report the number of choreographic works registered. Instead, they group it within the number of general performing art works registered."); Forcucci, *supra* note 19, at 964 (stating that most choreographers continue to rely on traditional dance community practices to protect their reputation and works, as it offers better protection for their work than copyright laws would).

⁷¹ 789 F.2d 157 (2d Cir. 1986).

⁷² *Id.* at 158 (explaining that Balanchine had died and that he was a "recognized master in his field").

⁷³ *Id.* at 159.

⁷⁴ *Id.* at 162 (holding that the correct test for this issue was the substantially similar test, looking to how the ordinary observer would look on the two works as similar or not).

major issues with dance and copyright, and *Horgan* will be used as an example of how some of these issues can be conceived by the courts.

1. “Choreographic works”

The requirement that the dance be a “choreographic work” to be protected under federal law is, in itself, an issue. Unlike the other works of authorship that are identified in vivid detail, “choreographic works” is not defined in the Copyright Act.⁷⁵ Legislative history of the Act suggests that Congress did not believe it was necessary to define the term because it has a “fairly settled meaning,” but the only specifics that the congressional reports provide are that “‘choreographic works’ do not include social dance steps and simple routines.”⁷⁶ However, apart from that limitation, it is fairly clear that Congress did not intend for the term to be overly restrictive. First, creating a new category of “choreographic works” separate from the historical concept of dance as a “dramatic work” suggests that Congress intended the term to be more flexible than before.⁷⁷ Second, other report comments made regarding choreographic works indicate a view that protection should be expanded beyond just narrative based dances by specifically identifying works outside of the classically narrative-based ballet.⁷⁸ Finally, Congress created the 1976 Act with the intention of maintaining broad categories to provide courts with the necessary flexibility to apply the Act’s terms.⁷⁹

⁷⁵ For example, “architectural work” is defined as “the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features”. 17 U.S.C. § 101 (2012); see Forcucci, *supra* note 19, at 938 (citing Lopez de Quintana, *supra* note 9, at 161, 163) (“The 1976 Act extends protection to choreographic works, yet fails to define the term ‘choreographic work.’”).

⁷⁶ S. REP. NO. 94-473, at 52 (1975); H.R. REP. NO. 94-1476, at 54–55 (1976).

⁷⁷ See Van Camp, *supra* note 68, at 60 (stating that the new category of “choreographic works” suggests the intention for broader protection).

⁷⁸ See S. REP. NO. 93-983, at 113 (1974) (“To ‘perform’ a work . . . includes . . . dancing a ballet or other choreographic work”); COPYRIGHT LAW REVISION, *supra* note 63, at 17 (“We see no reason why an ‘abstract’ dance, as an original creation of a choreographer’s authorship, should not be protected as fully as a traditional ballet presenting a story or theme.”).

⁷⁹ See S. REP. NO. 94-473, *supra* note 76, at 52 (“[T]he list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the

While the Act itself does not define “choreographic work,” many sources help formulate the meaning. Merriam-Webster’s dictionary defines dance as “to move one’s body rhythmically usually to music.”⁸⁰ This definition illustrates the more common concept of dance but does not fully illustrate all of the different forms dance can take.⁸¹ Other definitions of “dance” also often include the word “ballet” within them, once again limiting the scope of choreographic works to a historical characterization.⁸² Dance scholars have also attempted to more clearly define what makes a dance, looking to questions of the necessity of movement, music, or an audience, but there is still no consensus on a single definition.⁸³

The legal realm has also failed (or declined) to create one strict definition of “choreographic works.”⁸⁴ In a 1961 subcommittee report on the possible changes to copyright law, the committee recommended “choreographic works” be added as its own copyrightable category, defined as a work intended to be performed in front of an audience.⁸⁵ Congress chose to leave the term without a definition, giving courts the flexibility to define the terms on a case-by-case basis.⁸⁶ However, courts have only addressed the ambiguity of the term in two cases,⁸⁷ and both

courts from rigid or outmoded concepts of the scope of particular categories.”); H.R. REP. NO. 94-1476, *supra* note 76 (stating the same).

- ⁸⁰ *Dance*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dance> [<https://perma.cc/44M4-5SXL>] (last updated July 29, 2018).
- ⁸¹ *See* Traylor, *supra* note 20, at 237 (describing the broader definition of dance as given by the artists themselves).
- ⁸² *See* Van Camp, *supra* note 68, at 60–61 (explaining that using “ballet” as the representative of choreography is too limited and should not be used, in contrast with its use in definitions of choreography).
- ⁸³ *See id.* at 61 (indicating that the scholars have looked into various factors when considering the definition of “dance,” specifically the definition proposed by Martha Traylor).
- ⁸⁴ *See* Collova, *supra* note 45, at 82 (“Problematically, the definition of ‘choreographic work’ for purposes of the copyright statute is currently ambiguous.”).
- ⁸⁵ COPYRIGHT LAW REVISION, *supra* note 63, at 17 (“The statute should make it clear that [choreographic works] covers only dances prepared for presentation to an audience.”).
- ⁸⁶ *See* Collova, *supra* note 45, at 84–85.
- ⁸⁷ *See* Horgan v. MacMillan, Inc., 789 F.2d 157, 161–62 (2d Cir. 1986) (interpreting the term choreography and what it means to be a

times the courts deferred to the U.S. Copyright Office's Compendium of Copyright Office Practices for a definition.⁸⁸ The Compendium states, "Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright."⁸⁹ While this is the closest to a definition that the courts have adopted, it is only a guideline and is not law.⁹⁰ Therefore, courts are permitted to use a different definition, which has created confusion in the dance community as to whether a work is copyrightable.

Overall, some dance scholars prefer this more flexible concept of choreographic works over a crisper definition because they believe it can better align with the ever-shifting idea of what constitutes dance.⁹¹ However, many critics find fault with the flexibility and wish for a clear definition by the legislature because the current ambiguity leads to uncertainty over protection, especially as dance evolves over time.⁹² Contemporary choreographers focus much more heavily on pure movement than the dance itself, but legislative history leaves

choreographic work); *Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1043 (9th Cir. 2015) (interpreting the same).

⁸⁸ See Collova, *supra* note 45, at 85–86 (elaborating on the two cases and their deference to the definition found in the Compendium).

⁸⁹ U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES 400–18 (1984), available at <https://copyright.gov/history/comp/compendium-two.pdf> [<https://perma.cc/Y2KB-DNSB>] [hereinafter COMPENDIUM II].

⁹⁰ See *id.* ("The Compendium is a manual intended primarily for the use of the staff of the Copyright Office as a general guide to its examining and related practices.").

⁹¹ See Van Camp, *supra* note 68, at 61 (indicating the definition of choreographic work or dance should be evolving and flexible with the guidance of the dance community).

⁹² See generally Lopez de Quintana, *supra* note 9, at 153 (lamenting "Congress' lack of guidance" as to what exactly counts as choreography that can be protected by copyright); Adaline J. Hilgard, *Can Choreography and Copyright Waltz Together in the Wake of Horgan v. Macmillan, Inc.*, 27 U.C. DAVIS L. REV. 757, 789 (1994) (suggesting the adoption of a clarified definition of choreography based on movement and timing); Lula, *supra* note 69 (expressing a desire for a broad, yet clearly defined, view of what constitutes a choreographic work).

much skepticism as to whether movement alone would gain copyright protection.⁹³

Recently, *Bikram's Yoga College of India v. Evolation Yoga* dealt with this issue of defining choreographic works.⁹⁴ This case presented several issues regarding whether certain yoga sequences were protected under the 1976 Act.⁹⁵ The Ninth Circuit concluded that yoga movements are not choreographic works eligible for protection.⁹⁶ Yet the Court did not define "choreographic works" but rather relied upon the fact that together the yoga poses were a sequence, which is an exception to copyright protection.⁹⁷ Overall, this concern over the uncertainty of protection kept many choreographers from registering copyrights because they are not sure they would receive any benefit from a court if their work was infringed.⁹⁸

2. "Originality"

That the work must be "original" is another main tenant of the 1976 Act.⁹⁹ As briefly discussed above, a work can be deemed original even with a low

⁹³ See Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 289–90, 292 (1984) (discussing the choreographer's general focus on the abstract movement of the dance).

⁹⁴ 803 F.3d 1032, 1032 (9th Cir. 2015) (interpreting the 1976 Act and other sources to determine what counts as "choreography" and as a "choreographic work").

⁹⁵ See generally *id.*

⁹⁶ *Id.* at 1044 (holding that the yoga movements were not eligible because they were simply a sequence of body movements that were not covered by the definition of a choreographic work).

⁹⁷ *Id.* at 1043 ("In this case, we need not decide whether to adopt the Copyright Office's definition of 'choreographic work' or fashion another on our own because all categories of works eligible for copyright protection, including choreographic works, are subject to the critical requirements and limitations of Section 102.").

⁹⁸ See Lula, *supra* note 69, at 186 (citing Singer, *supra* note 93, at 317) ("Choreographers do not actively seek statutory copyright protection because they see no clear benefits from it.").

⁹⁹ 17 U.S.C. § 102(a) (2012).

modicum of novelty or creativity.¹⁰⁰ This is important to the concept of choreographic works; a choreographer can be influenced by a certain style or school of dance and still satisfy the originality requirement.¹⁰¹ The 1961 subcommittee report considered originality for choreography and stated that movements so simple or so stereotyped as to have no substantial element of “creative authorship” do not fulfill the originality requirement.¹⁰²

However, in assessing originality in choreographic works, difficulties arise when trying to distinguish between inspiration from another style of dance and from a work lacking creativity.¹⁰³ Because dance is often created within a community of artists that gather inspiration from each other and various styles of dance, it is difficult to know when a work is borrowing too much from another so as to no longer make it an original work.¹⁰⁴ One possible solution to this uncertainty is to draw correlations between the analysis of a choreographic work and other art forms.¹⁰⁵ For example, comparing dance to written works, isolated steps in a dance can be compared to individual words; neither can be copyrighted on their own, but it is the combination of steps or words that warrant protection.¹⁰⁶ Choreography can also be compared to music, in which courts, in evaluating

¹⁰⁰ See Singer, *supra* note 93, at 300 (describing the uncertainty as to what counts as original, especially because “[t]he courts have not yet considered the level of originality required for choreographic works”); see also *supra* Section II.B.1 (discussing the originality requirement under copyright law).

¹⁰¹ See Van Camp, *supra* note 68, at 62 (explaining that the influence by other authors or creators does not preclude the copyright protection).

¹⁰² See COPYRIGHT LAW REVISION, *supra* note 63, at 10 (stating the general copyright requirement that “any work, in order to be copyrightable, must be fixed in some tangible form and must represent the product of original creative authorship”).

¹⁰³ See Forcucci, *supra* note 19, at 940 (noting that the 1976 Copyright Act fails to draw a line between what is and is not acceptable for copyright, simply saying it must be original to some unestablished degree, which creates an issue as to how much influence can play a role in the work).

¹⁰⁴ See *id.* (noting a failure in both the law and in the courts to establish what level of borrowing from prior works would be too much such that the choreographer’s new work does not count as original).

¹⁰⁵ See *id.* (suggesting a possible solution to this issue is to analogize the analysis for choreography to the analysis used by courts to determine originality of musical works).

¹⁰⁶ See Van Camp, *supra* note 68, at 64 (stating that combination of steps, just as combinations of words, may warrant protection).

originality, have examined how rhythm, harmony, and melody are combined and if the composer added something new.¹⁰⁷ Similarly, a dance can be analyzed by evaluating how the choreographer uses and changes his timing, space, and movement to create a unique work.¹⁰⁸ While these comparisons may provide some guidance as to whether a choreographic work is original, there is still ambiguity with choreographic works that is not seen in the other artistic forms.

3. *“Expression versus Idea”*

Copyright law distinguishes between an idea and the expression of an idea.¹⁰⁹ The expression of an idea is protected, but § 102(b) excludes protection of ideas or procedures.¹¹⁰ Abstract ideas are not protected because they are conceptual building blocks for artistic works used in complex patterns to make up a copyrightable work; thus, abstract ideas need to stay in the public domain for all to use.¹¹¹ In choreographic terms, the separate movements of a dance, such as a plie, are unprotected ideas, but the dance as a whole is the protected expression of those ideas.¹¹² While it is clear that a new step would be excluded from protection, identifying which movements are the “building blocks” may be unclear; most dance movements can be broken down into simpler steps, such as an elaborate jump, broken down into the preparation, the jump itself, and the landing.¹¹³ Therefore, it may be difficult to delineate between what is a step and a sequence of steps.¹¹⁴

¹⁰⁷ See Singer, *supra* note 93, at 300 (noting that “cases involving musical composition provide some guidance” and that these are factors courts have looked to in music copyright cases).

¹⁰⁸ See *id.* (“Similarly, in judging originality of a choreographic work, the court should consider the choreographer’s treatment of rhythm, space, and movement in the work.”).

¹⁰⁹ 17 U.S.C. § 102(b) (2012) (explaining that ideas are not copyrightable).

¹¹⁰ *Id.*

¹¹¹ See Van Camp, *supra* note 68, at 66 (including examples of abstract ideas that should be “excluded from protection”).

¹¹² See *id.* at 67 (explaining that a single dance step is not protected, while a combination of multiple steps may be protected).

¹¹³ See *id.* (suggesting that distinguishing individual steps from a combination of steps would be challenging when determining whether a choreographic work can be protected).

¹¹⁴ See *id.*

However, even once a sequence of steps is identified, protection for that sequence is unclear. The court in *Bikram Yoga* held that the sequence of yoga movements could not be copyrighted; while the yoga sequences were individual steps put together in a graceful flow, the sequence was more of a process rather than an expression because it was a system meant to yield health benefits.¹¹⁵ Therefore, if dance movements serve more of a technical purpose, such as a new way to do a jump that may be better for more height or a new dance term to better understand the movement, that movement would not be copyrightable.

4. “Substantial Similarity”

When deciding whether a work has been infringed, a comparison is made between the alleged infringer’s work and the work said to be infringed.¹¹⁶ The court in *Horgan v. MacMillan* established that the correct test for the comparison is not whether the infringed work could be recreated but whether the two works are “substantially similar.”¹¹⁷ Therefore, two works do not need to be so similar as to be a full recreation of the work, but something less will suffice to meet a claim of infringement.¹¹⁸

However, even with this guidance by the courts, there are still significant problems assessing “substantial similarity” between choreographic works. Some extreme cases are clear, such as a finding of infringement when the same steps and tempo are used or a finding of no infringement when two dances only share some ordinary steps. However, it is the large range in between these extremes that causes uncertainty.¹¹⁹ Many choreographers borrow movements from others; while this is not an affront in the dance world, it is problematic in assessing

¹¹⁵ 803 F.3d 1032, 1044 (9th Cir. 2015) (holding that the yoga sequence was not copyrightable as it fell on the wrong side of the “idea/expression” dichotomy delineating between copyrightable and noncopyrightable works); see Collova, *supra* note 45, at 95–96 (elaborating on the Ninth Circuit’s holding in *Bikram Yoga* and the reasoning behind holding that a sequence of yoga movements is unprotected).

¹¹⁶ See Van Camp, *supra* note 68, at 72.

¹¹⁷ See 789 F.2d 157 (2d Cir. 1986).

¹¹⁸ See Van Camp, *supra* note 68, at 74 (indicating that so long as the allegedly infringing portion is qualitatively significant, such portion can be an infringement, including infringement to a small portion of the copyrighted work).

¹¹⁹ See *id.* at 72–73.

infringement, just as it is in assessing originality.¹²⁰ There is not a clear line between substantially similar works and works that simply draw upon other works for inspiration, a celebrated practice within the dance community.

Addressing this problem, the *Horgan* court argued that infringement among dances is found when “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.”¹²¹ This test presents concerns for a choreographic work because there are many other elements that affect the aesthetic appeal of the movement without changing the movement itself. For example, if the music or scenery is changed without changing the dance movements, the aesthetic appeal would be different.¹²² Furthermore, a different dancer performing the same work changes the aesthetic appeal because every dancer brings their own style to the movement. This shift can be minimal, such as casting an athletic dancer versus a dancer who moves much lighter and with more flow, or more significant, such as changing the dancer’s gender. In this way, the aesthetic appeal changes but the chosen movements are the same, creating confusion as to what constitutes copyright infringement in the dance community.¹²³

5. “Author or Owner of the Work”

While it may be clear who the author of a work is in other art forms, authors can be much more challenging to identify in the dance world. This can cause a major schism between the legal concept of ownership and the concept of ownership in the dance community, where credit for your creative work is paramount.¹²⁴ In general, because dance is a physical art, it can be quite difficult to

¹²⁰ See Forcucci, *supra* note 19, at 940 (explaining that choreographers can borrow from each other and that there is no set legal standard for how much borrowing constitutes illegality).

¹²¹ 789 F.2d at 162 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

¹²² See Van Camp, *supra* note 68, at 73 (providing an example where changing the music to which a dance is set could be seen as original for the purposes of copyrighting a choreographic work, therefore making the music choice an original element of the choreographic work).

¹²³ See *id.*

¹²⁴ See Shanti Sadtler, *Preservation and Protection in Dance Licensing: How Choreographers Use Contract to Fill in the Gaps of Copyright and Custom*, 35 COLUM. J.L. & ARTS 253, 273 (2011) (describing the schism between how the courts view ownership and how the community views ownership of a

separate the dancer from the dance.¹²⁵ It is common for a choreographer to create movement tailored to a particular dancer or even allow the dancer to improvise.¹²⁶ Therefore, the dancer may be seen as a possible joint author to the choreography.¹²⁷ However, if this were the case, the dancer would have an equal right to the piece and their proceeds, a strange concept to the dance community.¹²⁸ Most dancers would not define themselves as a creator but as part of the creation, performing the movement that the choreographer has chosen to display his concept.¹²⁹ The closest correlation between dance and another art form is represented in the case *Garcia v. Google*, in which an actress attempted to sue for copyright infringement of her acting within a work.¹³⁰ The Court found that her contribution to the work, while creative and original, did not meet the requirements for protection, including authorship and fixation, and the Court did not wish to splinter a movie into so many separate copyrightable works.¹³¹ Following this logic, it is unlikely a court would want to split the copyright of a dance among all of the dancers and the choreographer.

choreographed work created by a choreographer who works for a company).

¹²⁵ See Sue Greenberg, *May I Have This Dance?*, 49 ST. LOUIS B.J. 34, 38 (2003) (“Since it is difficult to separate the dancer from the dance, dancers and choreographers could be considered joint authors of the dances they create.”).

¹²⁶ See *id.* at 38 n.32 (quoting *Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 589 (S.D.N.Y. 2002) (“The creation of the dances was a collaborative process in which the Center’s [dancers] played an indispensable role.”)).

¹²⁷ See Forcucci, *supra* note 19, at 940.

¹²⁸ See Greenberg, *supra* note 125, at 39 (“[J]oint authors must regard themselves as such and intend for their respective, independently copyrightable contributions to be merged into a jointly-owned unitary whole.”).

¹²⁹ See *id.*

¹³⁰ 786 F.3d 733, 737 (9th Cir. 2015) (“Asserting that she holds a copyright interest in her fleeting performance, Garcia sought a preliminary injunction.”).

¹³¹ *Id.* at 741–44 (explaining that the actress’ portion was unable to receive copyright protection both because it was only a piece of the movie, and therefore unable to claim authorship, and because she did not fix the work herself).

In recognizing the choreographer as the author, the issue of a work for hire arises. Under the work for hire doctrine, a choreographer is hired to create a work, and the work created is then owned by the employer rather than the choreographer.¹³² This issue was presented in the *Martha Graham* case, which revolved around several works that the profound choreographer created.¹³³ The estate of Martha Graham, one of the most prolific modern dance choreographers from the U.S., brought a case against the dance foundation that held her name for using several of her choreographic works without the estate's permission.¹³⁴ The Court, however, found that almost all of the works belonged to the foundation, including some of her most seminal works, because Graham created them while she worked for the foundation, and thus, the works were deemed works for hire.¹³⁵ Therefore, unless there is a specific agreement to the contrary, works made by choreographers while they are employed by a company legally do not belong to the choreographer.¹³⁶ Since most choreographers are employed by universities or companies, the work-for-hire doctrine has a significant effect on the dance community.¹³⁷ However, this concept goes against the general agreement in the dance community that the choreographer, as the creator of the work, owns their

¹³² See Forcucci, *supra* note 19, at 967 ("Ultimately, copyright legislation . . . makes it nearly impossible for an individual choreographer to achieve statutory protection without the support of a well-funded employer, but then denies the choreographer statutory protection once the employment begins!").

¹³³ 224 F. Supp. 2d 567 (S.D.N.Y. 2002) (analyzing whether several of Martha Graham's works counted as works for hire under both the 1909 and 1976 Copyright Acts and ultimately determining that many of the works were owned by the center under the work for hire copyright doctrine).

¹³⁴ See *id.* at 569. See Greenberg, *supra* note 125, at 36 (explaining that the estate "sought a temporary restraining order to prevent the [foundation] from using Graham's name, teaching her techniques, or performing her dances").

¹³⁵ *Martha Graham*, 224 F. Supp. 2d at 570 (finding 45 works belonged to the foundation, 10 were in the public domain and 1 was given to the estate).

¹³⁶ See Greenberg, *supra* note 125, at 36 (explaining that the 45 works were assigned to the foundation because "the court found that the dances created by Graham while she was employed by the Center . . . were works made for hire").

¹³⁷ See Forcucci, *supra* note 19, at 967–68 (noting that individual choreographers tend to be employed and, therefore, the law does not recognize the financial reality giving choreographers inadequate protection under the existing law).

dance and the company simply licenses the work.¹³⁸ Because recognition of one's artistic work is one of the most vital aspects within the dance community the work-for-hire doctrine does not align with dance custom.¹³⁹

III. FIXATION – ANALYSIS

For a work to be copyrightable, it must be “fixed in a tangible medium” and two copies of the fixed work must be submitted to the U.S. Copyright Office.¹⁴⁰ This Section of the Note considers the issue of requiring fixation for the ephemeral art of dance and the role of the “fixator” in the creation of a copyrightable piece.

A. FIXATION AND DANCE

Fixation has long been discussed by dance scholars as the most controversial requirement to gain copyright protection for choreographic works.¹⁴¹ The legislative history of the 1976 Act recognizes the dilemma of fixation for dance pieces, but Congress generally agreed that new technologies and forms of documentation provide sufficient means of fixation.¹⁴² Because dance is a transient and physical art, the Copyright Office is flexible on the medium in which the

¹³⁸ See Sharon Connelly, Note, *Authorship, Ownership, and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 837, 841 (2005) (explaining that, per custom, choreographers generally own their choreography).

¹³⁹ See Lula, *supra* note 69, at 189 (explaining that choreographers are more concerned with recognition and preserving their work than they are with the work's financial revenue).

¹⁴⁰ H.R. REP. NO. 94-1476, at 52, 150.

¹⁴¹ See generally Anne K. Weinhardt, Note, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 *J. CORP. L.* 839, 843 (1988) (“Because choreographed dance is fleeting in duration, the fixation requirement is difficult to fulfill.”).

¹⁴² See COPYRIGHT LAW REVISION, *supra* note 63, at 16 (discussing how a copyright for a dance is now easier due to fixation becoming more “feasible in the form of systems of notation recently developed or in the form of motion pictures”).

fixation is provided.¹⁴³ For choreographic works, the most common forms of fixation are through video or a form of written notation such as Labanotation.¹⁴⁴

However, both video and written forms of fixation present issues of their own, beyond being expensive and time consuming.¹⁴⁵ For example, a video is only able to capture one angle of one performance of the choreography which limits its representation of the dance as a whole.¹⁴⁶ Therefore, the video fixation captures one interpretation of the dance on that particular set of dancers, and questions arise as to whether the stylistic choices of the dancers are then copyrighted as part of the dance itself and if a different video would then be a separate work entirely.¹⁴⁷ For notation, the three-dimensional movement is being compressed into a two-dimensional drawing that most dancers and choreographers cannot read themselves.¹⁴⁸ The purpose of the fixation to provide notice of the copyright and to preserve it for future generations; with a written fixation, the purpose is not truly achieved because experts would then be required to retranslate the work back into the movement.

Further issue is found with what constitutes the choreographic work when both a visual recording and a notation is created for the same work and there are discrepancies between a visual recording and written notation.¹⁴⁹ It is unclear whether only the shared elements of the fixations will be copyrighted as the work

¹⁴³ COMPENDIUM II, *supra* note 89, at 400–20 (allowing for multiple ways to create an “embodiment of choreography” for registration with the Copyright Office).

¹⁴⁴ Computer programs are also utilized but sparingly due to their lack of availability to choreographers. *See* Lopez de Quintana, *supra* note 9, at 161.

¹⁴⁵ *See id.* at 159–60 (explaining the issues of money and time that come with written fixation as well as the time-consuming nature inherent in video fixation).

¹⁴⁶ *See* Weinhardt, *supra* note 141, at 848–49 (explaining the limitations of using film for fixation, including that any given camera can only cover one angle of the dance).

¹⁴⁷ *See id.* (describing the issue of video capturing only a single point of view and only the style of the specific dancers in that recording rather than the more objective labanotation).

¹⁴⁸ *See id.* at 848 (describing the issue with video fixation that it does not “capture the three-dimensional aspect of the dance” making it difficult to accurately “reconstruct a work” for others to use).

¹⁴⁹ *See* Van Camp, *supra* note 68, at 68 (explaining the potential problems for determining the copyright protection when both visual recording and written notation are involved with discrepancies between the two).

or if the two will be viewed separately, and it is because of these inadequacies in the forms of fixation that differences occur.¹⁵⁰

The overarching problem with fixating a choreographic work, regardless of the form of fixation, is that fixation is a separate entity from the dance itself and seems to create an entirely new work. Because of dance's ephemeral nature, a work is considered finished and "fixed" in the dance community when it is officially set on its dancers rather than when there is a physical copy of the work.¹⁵¹ Therefore, the concept of fixation does not comport with the actual creation of the dance and seems to be a separate concept from the choreographic work.

B. THE ROLE OF THE FIXATOR

Because fixating the work is disjointed from the creation of the choreographic works, there is a significant question as to what the role of the fixator is in the creation of the copyrightable choreographic work. While the dance community may not define the fixator as an author, many of the different copyright author terms fit certain aspects of the role of the fixator.¹⁵² Under the originality requirement, the fixator brings a modicum of creativity to the work through their choices, such as what angles to film, when to focus on a particular dancer, or how to articulate a movement through notation. Under the fixation requirement, the work created by the fixator is fixed. Under the authorship requirement, a court may be more willing to split the copyright of the work up between the choreographer and the fixator. Unlike the *Garcia* case where the work the actress contributed was insufficient to constitute a separate, copyrightable work, the fixator of choreographic works creates a full-length piece by fixing the work.¹⁵³

¹⁵⁰ See *id.* at 68–69 (indicating the uncertainty as to how to determine copyright infringement when viewing a choreographic work that contains both a visual recording and a notation, especially when the fixation is more relevant to the suit).

¹⁵¹ See Lopez de Quintana, *supra* note 9, at 162 (explaining that "[c]horeographic credit is awarded to a work the moment a choreographer 'releases' it," meaning the first time the dance is performed in public).

¹⁵² H.R. REP. NO. 94-1476, at 52 ("[T]here is little doubt that what the cameramen and the director are doing constitutes 'authorship.'").

¹⁵³ See *Garcia v. Google, Inc.*, 786 F.3d 733, 741–44 (9th Cir. 2015) (explaining that the actress' portion was ineligible for copyright protection because it was only a piece of the movie and she did not fix the work herself).

The question arises as to whether the fixator can be seen as an author and, if so, what sort of author the fixator may be. There are three possibilities. First, the fixator could be seen as a joint owner of the work with the choreographer; the choreographer provides the movement and the notator provides the skills of notation as well as some limited creativity in the notation choices, and in the eyes of the law the works were created to be put together as one fixed piece. However, choreographers and notators themselves would not see the works as one combined effort but as two separate works. A choreographer does not see their work as being dependent on the notation, and the notation is something separate from the original movement. Thus, the dance community would not recognize the fixator as a joint author.

Second, the fixator may be an author of a derivative work of the choreography; the movement is the preexisting work that is then transformed into notation. However, holding the fixator as a derivative work author could be difficult since it is impossible to separate the fixation elements, owned by the fixator, from the preexisting movement itself, particularly because these two are in different mediums.

A fixator could also be seen as creating a work for hire or commission by the choreographer as the employer. This is most likely the closest definition to how the dance community sees the fixator's work since it is a work specially ordered by the choreographer as almost a translation of the work itself. However, this definition is unsatisfying to the fixator; the fixator's work is an essential aspect of allowing the dance to be copyrightable, and the creative choices in fixation are not chosen by the fixator. As a fixator, it takes much skill and time to create a notated piece that is accurate and clearly written, and for that work to be absorbed into the choreography overlooks all of the labor and input of the fixator.

Third, the fixator may be the sole author of an independent work. Like musical recordings, the choreographic work and the fixation of that work may be separate copyrightable works. Musical works and their recordings have separate authors and individual rights, even though both the recording and the musical work represent the same artistic work.¹⁵⁴ Sound recordings, defined as "works that result from the fixation of a series of musical, spoken, or other sounds but not including sounds accompanying a motion picture or other audiovisual work," are

¹⁵⁴ See generally Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1 (2014) (explaining the separation of musical composition and musical recording in copyright law as well as some differing rights between the two).

protected separately from the underlying musical work.¹⁵⁵ Generally, copyright protection for sound recordings extends to two different groups of people: the performers whose performance is captured and the persons responsible for capturing and processing the sounds to make the recording.¹⁵⁶ Similarly, choreography can be separated from the notated or filmed piece to give the fixators authorship of and rights to the fixed work. This allows the choreographer to have sole rights in their movements while allowing the fixator rights in their physical work.

However, there is one significant complication with the comparison between music and dance. While a sound recording is independently protected, separating the sound recording doesn't affect protection for the underlying musical work because that musical work is still independently fixed. Choreography, on the other hand, does not have a separate form of fixation independent of the notation or film that is accepted under the Copyright Act. Therefore, this proposal requires a new definition for the fixation of the choreographic movement itself, such as allowing the dance custom of the movement being fixed once it is set on the dancers to prevail.

IV. CONCLUSION

The Copyright Act of 1976 represents a significant improvement in recognizing dance as an equal art to the other art forms previously protected; however, there are still noteworthy challenges in applying this newfound protection for dance. Most of the challenges arise because of the conflict of dance customs with the legal aspects of copyright and the ephemeral nature of dance, including the definition of "choreographic works"; the required elements of originality and expression; the application of substantial similarity; and the common issue of works for hire. The issue of fixation is most significant because of dance's major delineation from the other art forms in having to create a separate work to create a fixated version. Therefore, for copyright law to fully protect the artistic works of choreographers and fixators combined, choreography should provide clearer protection for the creators, including the fixators. This solution is found by comparing choreography to other art forms, such as music, covered by

¹⁵⁵ U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS, CIRCULAR 56 (2017), available at <https://www.copyright.gov/circs/circ56.pdf> [<https://perma.cc/4GJ4-SDAD>]

¹⁵⁶ *See id.* ("The author of a sound recording is the performer featured in the recording and the producer who captured and processed the sounds that appear in the final recording.").

copyright law for much longer, while still identifying and appreciating the differences in the ephemeral art of dance.

V. APPENDIX

THE BODY SIGNS

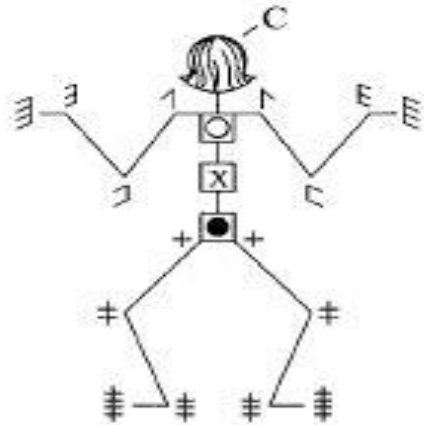


Figure 1. The Symbols Used to Identify the Different Body Areas¹⁵⁷

¹⁵⁷ GUEST, *supra* note 5, at 451.

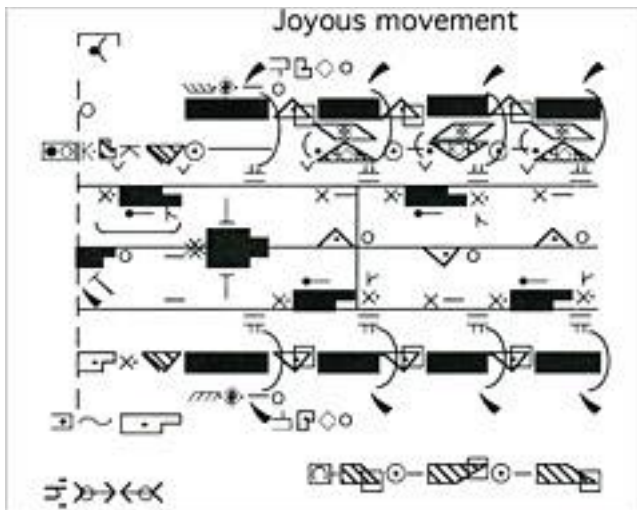


Figure 2. Example of A Labanotation Score for Four Counts, Which Would Range from About Two to Four Seconds¹⁵⁸

¹⁵⁸ Roslyn Sulcas, *All the Right Moves*, N.Y. TIMES (Aug. 30, 2007), <https://www.nytimes.com/2007/08/30/arts/dance/30nota.html> [<https://perma.cc/V7UB-HQLM>].

