Copyrightability of Choreography

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THE COPYRIGHTABILITY OF CHOREOGRAPHY

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I. INTRODUCTION

You and your co-worker have just finished choreographing a work and setting it on dancers through a month of grueling rehearsals at a local dance studio that you are employed by. The performance came and went and it was on to the next dance. About a month later, you attend a performance choreographed by another local choreographer, and notice that one of her dances was practically identical to the one you just revealed a month prior. Your dance was protected by copyright law, right? It was performed in front of over 100 people, of course it is; she can’t steal it, can she? What are your rights as a choreographer? Do you own the dance or your co-worker? Were you supposed to register your choreography with the Copyright Office? Was the studio you work for? Does the choreographic community accept this type of behavior?

It seems that many choreographers are unaware of the laws that protect their dances. In a questionnaire I presented to local choreographers, I asked “At what point does a work become protected by copyright law?” The answers received were:

Once published, either by video or public performance; The work is protected upon its completion; As soon as the piece has started and has been set with dancers/performers, after the first rehearsal. I think it absolutely should be protected by copyright law once the piece has been performed in full for an audience; Once the goal and intention of the choreography has been established and the choreographer has begun work on the project[.][^2]

This ignorance is not unwarranted. Dance, one of the oldest forms of art, comes about through a creative process, with many opportunities to overlap with copyright law; however, it is an issue that is seldom brought up in the court system[^3] and usually ignored by choreographers.

Choreographers often ignore copyright law because they are intimidated by the financial burden they feel it has and most choreographers think that their community customs offer better protection than the law can[^4]. This paper aims to discuss the copyrightability of

[^1]: Prior to writing this paper, I created a questionnaire to send to local choreographers in the greater-Raleigh area. Throughout the paper I have shared some of their responses to these questions in hopes that they are representative of the choreographic community in general. I refer to these responses throughout the paper as the “questionnaire.”
[^2]: Questionnaire responses.
[^3]: See infra Section III.
[^4]: See infra Section V.
choreography and help alleviate some of the intimidation choreographers feel when dealing with the law. This paper is written in hopes of educating choreographers on the laws that protect the works into which they put their whole lives.

II. History

No one knows when dance began, but one might suspect that it was probably around the same time that man learned to walk. “In nearly all surviving cultures we find dances that are not merely spontaneous outburst of feeling . . . but patterned, rhythmical sequences, performed in a special place and designed to make a particular impression on the spectators.”

On the other hand, one can pinpoint exactly when protection was afforded to choreographic works. Under Article I, Section 8, Clause 8 of the United States Constitution, Congress has the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings . . . .” This became the basis of copyright law in the United States; however, there was no mention of choreography in any of the U.S. Copyright Act’s until 1976, when “pantomimes and choreographic works” became expressly protected. Previously, choreography could only be protected if it was considered a “dramatic composition.” Dance was protectable only if it was created in facilitation of telling a story, developing an emotion, or otherwise conveying a dramatic concept.

Dance is:

Movement to music or rhythms; a human being way of expressing life; an expression of feelings and creativity . . . a universal language; intentional physical expression; movement or stillness, set to accompaniment or set in silence; an art form that verbally, non-verbally, and visually, represents thoughts, feelings and emotions through movement. This mode of self expression and identification can educate, tell a story, become therapeutic, reflect a culture, and always evoke a response.

Choreography is:

A movement put in sequence to create a ‘phrase’ or ‘combination’. It is created and set on movers, usually to be performed on a stage in front of an audience; the arranging and setting of dance . . . ; specific movements in a particular order; Putting a series of movements together to form a phrase or convey a message; putting your own thoughts and movement on other dancers.

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5 DANCE AS A THEATRE ART: SOURCE READINGS IN DANCE HISTORY FROM 1851 TO THE PRESENT 1 (Selma Jeanne Cohen et. al. eds., 2nd ed. 1992).
6 U.S. CONST. art I, § 8, cl. 8.
9 In the questionnaire, I asked the choreographers to “Define dance.”
10 In the questionnaire, I asked the choreographers to “Define choreography.”
The Copyright Act does not define “choreography,” however the Compendium of Copyright Office Practices, Compendium II (1984) defines it as “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.”

In 1957, Paul Taylor created a piece entitled “Duet.” This was an experimental piece in which Taylor stands next to a reclining woman, in which neither dancer moves for the duration of the piece. This four minute piece was said to call attention to the fundamentals of dance other than movement, such as posture and the arrangement of dancers in space. Certainly, the choreographers who provided the mentioned definitions would consider this choreography, but would it meet their definition? Would they have the same opinion of it was an unknown choreographer who created the piece, and not the infamous Paul Taylor?

It is no wonder that courts and lawmakers have had trouble coming up with a workable definition for the term “choreography,” and it is no surprise that, even today, there still is not one. In a world dominated by technology driven media, such as file sharing, the world of copyright law has seemingly focused all of its attention on keeping up with new technologies. The digitization of works such as music, film, and books, has appeared to put some of the more traditional forms of art in the backseat. However, the lack of a proper definition does not mean that these dances are not protected.

III. CASES

a. HORGAN V. MACMILLAN

There have not been many cases which mention choreography, especially with respect to copyright law. In one of the major cases, Horgan v. Macmillan, the court went as far as to state, “[e]xplicit federal copyright protection for choreography is a fairly recent development, and the scope of that protection is an uncharted area of the law.”

In 1954, George Balanchine, chief choreographer of the New York City Ballet, choreographed his own version of the ballet The Nutcracker. In 1985, the defendants published a book entitled “The Nutcracker: A Story & a Ballet.” The book depicts, in text and photographs, the New York City Ballet Company's production of The

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12 Paul Taylor is a modern dance choreographer, who gained much popularity in the 1950's and remains a world renowned artist today. He is considered to be one of the pioneers of modern dance.
14 Similarly, in 1952, composer John Cage created a piece entitled “4’33’.” In his composition, Cage instructs the musicians to not play a sound for the entire four minutes and thirty-three seconds. Cage’s intention was for the piece to consist of the sounds in the environment that the listeners hear while it was being performed. Should this be considered a musical work?
15 Horgan, 789 F.2d at 160.
The main portion of the book consists of 60 color photographs, depicting scenes from the ballet. The book follows the sequence of the ballet's story and dances. The photographs are accompanied by text that narrates the story, including those portions of the story not portrayed by the photographs.\textsuperscript{17}

Barbara Horgan, executrix of the estate of the choreographer Balanchine, claimed that the book infringed on the copyrighted choreography of Balanchine, which raised the question to the court of whether photographs taken of a ballet can infringe the copyright on the choreography for the ballet.\textsuperscript{18}

The district court held that the book did not infringe Balanchine's copyright. The court reasoned that because choreography is the flow of steps in a ballet, that flow of movement could not be reproduced by showing only still photographs and text in a book.\textsuperscript{19}

The case was then brought up in the 2\textsuperscript{nd} Circuit, where Horgan claimed that the Nutcracker book violated the copyright of Balanchine's work because it embodies the essential elements of the Balanchine Nutcracker, or, alternatively, that the book is an infringing derivative work.\textsuperscript{20} The defendant argued that because the book did not capture the flow of movement in the ballet, that there is no way the performance could be recreated from the photographs. However, the standard for determining copyright infringement is whether the allegedly infringing copy is “substantially similar” to the original work, not whether the original could be recreated from the allegedly infringing copy.\textsuperscript{21}

The court stated that “[a] snapshot of a single moment in a dance sequence may communicate a great deal. It may, for example, capture a gesture, the composition of dancers' bodies or the placement of dancers on the stage.”\textsuperscript{22} For instance, one of the photographs in the book shows one of the dancers jumping through a hoop, with her legs thrust forward, parallel to the stage and in mid air. From this photograph, the reader understands instinctively, based on forces such as gravity, that the dancer had just jumped up from the floor, and came back down to the stage shortly after the photograph was taken.\textsuperscript{23}

\textsuperscript{16} See id. at 158.
\textsuperscript{17} See id. at 159.
\textsuperscript{18} See id. at 158.
\textsuperscript{19} See id.
\textsuperscript{20} See Horgan, 789 F.2d at 161.
\textsuperscript{21} See id. at 162.
\textsuperscript{22} Id. at 163.
\textsuperscript{23} See id. at 163. The court also states that a single photograph of a dance “communicates far more than a single chord of a Beethoven symphony — the analogy suggested by the district judge.” Id.
The court did not say that the book infringed on the Balanchine Nutcracker, however it did say that the district court erred in stating that photographs cannot infringe choreography. For that reason, the court remanded the case. Before the case was brought back to the district court, the parties settled.

b. **Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.**

Another famous case involving copyright law and choreography is a case involving Martha Graham and who is the rightful owner of her dances. Martha Graham was an American choreographer, and modern dance pioneer. She is known for creating a new language of dance, focusing on the torso as a center for dance. She is famous for creating the work, *Lamentation*, and inventing Graham Technique. She died in 1991.

Prior to her death, Martha Graham named Ronald Protras as the sole heir to her estate, as well as the Trustee of the Martha Graham Trust. The Martha Graham Trust is in charge of licensing the intellectual property, previously owned by Graham. In 2000, Protras started the Martha Graham School and Dance Foundation (the “Foundation”). The defendants, Martha Graham Center of Contemporary Dance (the "Center") and Martha Graham School of Contemporary Dance (the "School"), were created by Graham to assist in operating her business. The dispute between the two parties came about following Graham’s death, posing the question of who owns her intellectual property.

This case was brought to court three times, twice on appeals brought by Protras, on behalf of the Foundation, for various reasons. In 2001, Protras and the Foundation sued the Center and the School for copyright infringement. The Center and the School then brought a counterclaim, claiming ownership in the copyright of the dances. The court found that during her lifetime, Martha Graham transferred

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24 See id. at 163. (The court stated “[i]t may be that all of the photographs mentioned above are of insufficient quantity or sequencing to constitute infringement; it may also be that they do copy but also are protected as fair use.”).

25 See Horgan, 789 F.2d at 163.

26 The case was remanded to determine things such as “[t]he validity of Balanchine's copyright, the amount of original Balanchine choreography . . . in the New York City Ballet production of The Nutcracker and in the photographs, and the degree to which the choreography would be distinguishable in the photographs without the costumes and sets (in which appellant claims no right) . . .” Id. at 163.


28 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 455 F.3d 125, 126 (2d Cir. 2006).

29 See id.

30 See id.

31 See id.

32 See id. at 127.

33 See id. at 126.

34 See id. at 127.
the rights to practically all of her dances to the Center.\textsuperscript{35} In 2002, on appeal, the court held that the Center and the School owned the copyright in forty-five of Martha Graham’s works, where the Foundation owned the copyright in only one.\textsuperscript{36} The court held the Center and School owned the copyright in those works because they exercised control over the dances.\textsuperscript{37}

Protas again appealed the ruling and in 2004, the court affirmed the previous court’s decision, but reversed and remanded on three issues.\textsuperscript{38} The court again affirmed on the first two issues, that Graham assigned her pre-1956 dances to the Center, and the dances created between 1966 and 1991 were “works for hire” because the Center paid Graham to create them. However, the court decided to look further into the status of seven dances\textsuperscript{39} created between 1956 and 1965.\textsuperscript{40} In 2005, the court held that “[a] preponderance of the credible evidence shows that the common law copyrights in [the seven dances] were assigned to the Center by Martha Graham.”\textsuperscript{41}

In 2006, Protras brought his most recent appeal, stating that the court abused its discretion in finding that those seven dances belonged to the Center.\textsuperscript{42} The court affirmed stating that there was specific evidence, such as contracts and documents, indicating that the copyright belonged to the Center.\textsuperscript{43}

\textbf{IV. COPYRIGHT LAW}

Copyright law was created in order to “promote the progress of science and useful arts.”\textsuperscript{44} Copyright law has tried to achieve this goal by giving protection to authors, in order to allow them to reap the benefits that they have sowed. By doing so, authors are rewarded with the work that they have strived to create economically, socially, and beyond. Such incentive causes other authors to realize the benefits of creating new works, which helps promote creativity and culture in the community. However, many choreographers have no idea how and when their work actually becomes protected by copyright law.\textsuperscript{45} Choreographers should note that a work receives automatic protection as soon as an author has met the two requirements of originality and fixation.\textsuperscript{46}

\textit{a. ORIGINALITY}

\begin{footnotes}
\item See id. at 126.
\item See id. at 127.
\item See id. at 127. The court also relied on testimony that Graham had assigned her rights in the works to the Center during her lifetime.
\item See id.
\item The seven dances in question were: “Embattled Garden,” “Episodes: Part I,” “Phaedra,” “Secular Games,” “Legend of Judith,” “The Witch of Endor,” and “Part Real-Part Dream.”
\item See id. at 127.
\item Id. at 128.
\item See id.
\item See id. at 130-131.
\item See U.S. CONST. art I, § 8, cl. 8.
\item See supra note 2.
\item See 17 U.S.C. § 102(a).
\end{footnotes}
The first test for copyrightability of a work in the United States is originality.\textsuperscript{47} The originality requirement is not a particularly hard one to pass; it requires only that the author make the selection or arrangement independently,\textsuperscript{48} and that it exhibit a “modicum of creativity.”\textsuperscript{49}

“The [Copyright] Act does not define choreography, and the legislative reports [state] only that ‘social dance steps and simple routines’ are not included.”\textsuperscript{50} The Compendium of Copyright Office Practices, Compendium II (1984) defines “Choreographic Content” as follows:

Social dance steps and simple routines are not copyrightable . . . . Thus, for example, the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. However, this is not a restriction against the incorporation of social dance steps and simple routines, as such, in an otherwise registrable choreographic work. Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer's basic material in much the same way that words are the writer's basic material.\textsuperscript{51}

Though the courts have never discussed originality in association with copyright, from this definition, it seems as if the originality requirement may be a bit stricter for choreography. However, choreographers should not fret over this fact, because even though simple steps or routines are not protected, the combination of simple dance steps and routines would likely create a sufficiently original work under the definition of originality.

\textbf{b. Fixation}

Dance is one of the most easily perishable forms of art. Before the recent developments in video recording technology, many choreographers did not attempt to preserve their dances, nor did they know how to go about doing so. Even today, many important works remain unrecorded on video or in writing.\textsuperscript{52} This fact is not only important to dancers and choreographers in order to learn about and preserve famous works from the past, but it is also a requirement for a work to be protected by copyright law.

After originality, the second requirement for a work to be protected by copyright is to be “fixed in any tangible medium of expression.”\textsuperscript{53} Choreographers must note that regardless whether a work has been performed in front of an audience, your work must still be considered fixed to receive protection. “A work is ‘fixed’ in a tangible

\begin{footnotes}
\item[47] See id.
\item[49] Id. at 355.
\item[50] Horgan, 789 F.2d at 161.
\end{footnotes}
medium of expression when its embodiment in a copy . . . 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.” However, it seems as if choreography is different from the other arts, in that, “[u]nlike literary works or musical compositions, dance works are rarely created in written form. Choreographers typically create their works on the dance floor by directing the movements of their dancers.” Even though choreography became expressly protected fairly recently, means of fixation was still a problem for choreographers.

There are two main ways to fix a work today: in writing or by use of audiovisual technology. One of the most popular types of written recording of dance is “Labanotation.” “Rudolph Laban . . . was an artist, philosopher, dancer, author, educator, and researcher into the nature of movement.” In collaboration with Albrecht Knust and Ann Hutchinson Guest, Rudolph Laban created a comprehensive system of movement called “Labanotation.” Labanotation provides choreographers with specific symbols and notation in order to allow them to record their movements. Dancers, who have the requisite knowledge of how to read this language, can then decipher movements from the writing. Little do choreographers know, Labanotation also has a legal function, in that it would likely satisfy the fixation requirement.

Similar to Labanotation, some choreographers have their own method of notation to record, in writing, their choreographic ideas. To that choreographer, and to others, a dance could be perceived, reproduced, and otherwise communicated. Though individually created dance notation has never been brought up in court, they would satisfy the fixation requirement. However, the problem with Labanotation and these other forms is that they are relatively unknown among choreographers. Labanotation takes years to learn and to have a dance translated into notation by an expert can cost over one thousand dollars. Other types of notation are only known by the choreographer herself and maybe a few others, making it impractical to record dances in this way. Consequently, many choreographers fail to record their dances in written notation.

The next way to satisfy the fixation requirement is to record a dance in a video. Many argue that video fixation puts an unfair burden on choreographers, because unlike other forms of art, dance is not automatically fixed. Writers fix their work in

56 See Id. at 1446 (“Means of fixation do exist, but these means are still in their infancy and do not adequately assist a choreographer in protecting his or her right of authorship”).
57 SALLY FITT, DANCE KINESIOLOGY 357(1996).
58 Id. at 358.
59 See Lula, supra note 26, at 183.
60 See id. at 183.
61 See id.
62 See id. at 182.
n flowers, movies are fixed in film, but choreography is meant to be performed,63 and some believe that the extra expense to fix a dance in a video proves too much for choreographers.64  Also, video is limited in the way it portrays a dance. Most choreographers that choose to video tape their dance, would place a camera in a particular location in the audience somewhere. The problem with this is that dance will then only be shot from one specific location and from one angle, and it will not properly convey the three-dimensional nature of the dance.65

However, with the recent development in digital video technology, the fixation requirement no longer places any extra burden on choreographers. Every choreographer interviewed had some form of technology that allowed the recording of video; whether it be a digital camera, cell phone, or iPod. Even though a video shot through a cell phone may not be the quality a choreographer would want to showcase, it nonetheless suffices to meet the fixation requirement. Without a recording, it would be impossible to bring an infringement claim. This recording could serve both as proof of a copyrighted work as well as a way to archive your works.

c. YOUR RIGHTS AS A COPYRIGHT HOLDER

“The rights of a choreographer in his work were not clearly defined, in part because the means for reducing choreography to tangible form had become readily available only comparatively recently, . . . in part because of resistance to the acceptance of abstract, non-literary dance as a worthy form of artistic expression.”66 Today, once you have satisfied the requirements for gaining copyright protection, copyright law grants you the exclusive rights to do as you wish with your work regarding reproduction, the preparation of derivative works, distribution of copies of your work, performance rights, and public display rights.67

First, the reproduction right allows choreographers to both restage their work and also to stop any unauthorized performances of the work staged by a choreographer.68 Second, a choreographer may prepare a derivative work of a preexisting work, if certain requirements are met. A derivative work is a work based on a preexisting work, such as a musical composition or even another dance.69 A choreographer may get copyright protection only for the material contributed by the choreographer, and not in any of the preexisting material.70 A choreographer will gain protection in her added material if that material does more than minimally contribute to the existing

63 See id.
64 See Lula, supra note 26, at 184.
65 See id.
66 Horgan, 789 F.2d at 160.
69 See id. at 283.
70 See id.
work. The new material must create a “‘distinguishable variation’ that is more than ‘merely trivial.’” The most typical derivative works a choreographer would create are works based off a ballet that is currently in the public domain or a work based off a musical composition.

The third economic right awarded to owners of a copyrighted work is the right of distribution. The distribution right allows a choreographer to control the first public distribution of her work, either by sale or other means of distribution, such as lease or rental. This allows choreographers to control distribution of video recordings of their work and also to stop anyone from performing the work from memory. As a choreographer, you have the right to sell DVDs of your dance, as well as prevent one from learning your dance from that DVD and performing it herself.

The fourth, and probably most important right to a choreographer, is the right to publicly perform your dance. To “perform” means that you can either dance either directly or “by means of any device or process.” To “publicly perform” your dance is to perform or transmit a performance of your dance in a place open to the public, or in a place where a substantial group of people are gathered. This right also allows a choreographer to license out her dances allowing other people, or dance companies, to perform them.

The fifth and final right granted to a copyright holder, is the right to publicly display the work. This right is similar to the public performance right, in that this allows you to show a copy of your work. Dances broadcast through the television or over the internet, are protected under this right.

d. Duration

Copyright law states that copyright protection only lasts for a fixed amount of time. After that time period expires, a work enters the public domain, and all of the exclusive rights granted to the work’s author are then available to the public and the work may be used freely without requesting permission from the original owner. A copyright owner’s exclusivity period is determined by the category of work, date of publication or registration, location of publication whether foreign or domestic, and other conditions. Today, for both works published in the United States and for

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71 See id.
72 Id.
73 See id.
75 See Swack, supra note 50, at 283.
77 See id. The substantial group of people viewing your dance needs to be considered “outside of a normal circle of a family and its social acquaintances.”
78 See Swack, supra note 50, at 283.
79 See id. at 284.
unpublished works copyright protection lasts for the life of the author plus 70 years. For anonymous and pseudonymous, works of corporate authorship and works for hire, protection lasts for 95 years after date of first publication or 120 years from the date of creation, whichever expires first.\textsuperscript{81}

e. Registration

As mentioned earlier, copyright protection is automatic once the two requirements of originality and fixation are met for your choreographic work. So why should you register your work? Are you just paying money to the government for a piece of paper?

Many choreographers are unaware of the registration process for a copyrighted work.\textsuperscript{82} However, registration affords an author with a number of benefits:

Many choose to register their works because they wish to have the facts of their copyright on the public record and have a certificate of registration. Registered works may be eligible for statutory damages and attorney's fees in successful litigation. [Also], if registration occurs within 5 years of publication, it is considered \textit{prima facie} evidence in a court of law.\textsuperscript{83}

As of 1980, only sixty-three of the 464,743 registered copyrighted works were choreographic works.\textsuperscript{84} As of 1982, only 132 of the 468,149 registered copyrighted works were choreographic works.\textsuperscript{85} After 1982, the Copyright Office stopped listing “choreographic works” as a separate category and combined it with other performing arts works.\textsuperscript{86} As of 2009, the most recent report available from the Copyright Office, 93,254 works were registered in the performing arts category, though it is likely that many of those were not purely choreographic works.\textsuperscript{87} This is clear evidence that choreographers are either unaware or see no advantages to registering their works.

As previously mentioned\textsuperscript{88}, the fixation requirement today, is not particularly hard or expensive to satisfy. Registration only requires paying a fee, currently set at $35,

\begin{footnotesize}
\textsuperscript{81} For complete information on copyright duration, including the length of a term for works published prior to 2002, you can view the “Copyright Term and the Public Domain in the United States” at http://www.copyright.cornell.edu/resources/publicdomain.cfm.
\textsuperscript{82} Questionnaire responses.
\textsuperscript{83} COPYRIGHT IN GENERAL, http://www.copyright.gov/help/faq/faq-general.html#automatic (last visited Dec. 6, 2010).
\textsuperscript{86} 2009 COPY. REG. ANN. REP. 46, available at http://www.copyright.gov/reports/annual/2009/ar2009.pdf. Other works included are “[w]orks of the performing arts, including musical works, dramatic works, choreography and pantomimes, and motion pictures and filmstrips.”
\textsuperscript{87} See id.
\textsuperscript{88} See supra Section IV(b).
\end{footnotesize}
and depositing one or two copies of a work.⁸⁹ Choreographers that make a living by putting on performances should always consider registration after creating a new work, in order to protect themselves and preserve their work.

**f. Joint Works**

“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.”⁹⁰ When two or more authors create a work under this intention, the authors are said to have joint copyright ownership.⁹¹ Each author that contributes to the work must contribute to the work and fit the definition of an “author” under the Copyright Act. Also the intent to create together must be made at the time of creation. If at the time of creation, the authors did not have the intention that the work be considered a joint work, the fact that their works are later put together does not create a joint work. Instead, the result is considered a collective work. In this case, each author owns a copyright in only the material he or she added to the finished product.

The U.S. Copyright Office considers joint copyright owners to have an equal right to register and enforce the copyright. Unless the joint owners make a written agreement to the contrary, each copyright owner has the right to commercially exploit the copyright, provided that the other copyright owners get an equal share of the proceeds. Duration of a joint work extends 70 years after the death of the last remaining author.⁹²

If choreographing a work with another, it would be a good idea to create an agreement stating the intent of the work as being a joint work. This will help resolve any future confusion and prevent having to rely on the court to interpret the intent at the creation of the work.

**g. Works For Hire**

So far, you have learned the general rule that the person who creates a work is the author of that work. The “work for hire” principle is an exception to this rule. The Copyright Act defines a category of works called “works made for hire.” If a work is made for hire, the employer, and not the employee, is considered the author. The employer may be a business, such as a dance studio. The Copyright Act defines a “work made for hire” as:

1. a work prepared by an employee within the scope of his or her employment; or
2. a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work,

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⁸⁹ For more information on registering a work, visit http://www.copyright.gov/help/faq/faq-register.html#register.
⁹² Keep in mind that if one author dies, his heir would inherit his status as a joint owner in the copyright of the work.
as a translation, as a supplementary work, as a compilation, as an instructional text, as 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. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for a 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 intended to be used in systematic instructional activities.\textsuperscript{93}

When looking at the first prong, the Supreme Court held in \textit{Creative Non-Violence v. Reid}, the term “employee” should be interpreted according to common-law agency principles.\textsuperscript{94} To determine if someone is considered an employee, the Court in \textit{Creative Non-Violence} examined if the hiring party’s right to control the manner and means by which the work is accomplished.\textsuperscript{95} They looked to a few factors, such as control by the employer over the work done, control by the employer over the employee, and the status and conduct of the employer, to help determine one’s status as an employee.\textsuperscript{96} No single one of these factors is determinative in establishing an employment relationship, though they represent characteristics found in a typical employment relationship. “The closer an employment relationship comes to regular, salaried employment, the more likely it is that a work created within the scope of that employment would be a work made for hire.”\textsuperscript{97}

When examining the second prong, a work can be a work made for hire only if “[1] it comes within one of the nine categories of works listed in part 2 of the definition and (2) there is a written agreement between the parties specifying that the work is a work made for hire.”\textsuperscript{98}

With regard to choreographers, we would likely encounter both prongs of the definition. For example if you were choreographing for a dance school in which you salaried, full time employee, you would likely fall under the first prong. However, if you were commissioned to choreograph a work for a specific performance, you would likely fall under the second prong. The duration of a work made for hire is 95 years from the date of publication or 120 years from the date of creation, whichever expires first.

\textsuperscript{93} 17 U.S.C. § 101.
\textsuperscript{95} See \textit{id}.
\textsuperscript{96} See \textit{id}.
\textsuperscript{98} \textit{Id}.
h. Fair Use

One common scenario that occurs throughout the choreographic community is using steps or phrases of an already existing dance, and incorporating it into your own. As discussed earlier, single steps or simple dance routines are like a dancer’s vocabulary, and lack sufficient originality to receive copyright protection.\(^{99}\)

However, the more you take, the more likely it will be deemed original and protected under copyright law. One common defense to a claim of copyright infringement is the doctrine of fair use. The doctrine of fair use was codified in the Copyright Act of 1976 and states that the “fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”\(^{100}\)

Rather than attempting to define precisely what would constitute fair use, the doctrine lists four factors that courts should consider in determining whether a particular use of a copyrighted work constitutes fair, thus making that use non-infringing.\(^{101}\) These four factors include: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”\(^{102}\) Courts use these four factors, and balance them on a case by case basis, in light of the purpose of copyright law.\(^{103}\)

Courts take a number of considerations into account when evaluating the first factor – the purpose and character of the use. The first major consideration is to determine if the work is “transformative”\(^{104}\). Transformative means that the work adds something new, furthers the purpose, changes the character, or shows a new expression, meaning, or message to a work. A common example of a transformative use is a parody.\(^{105}\) The closer something is to the original expression, the stronger the argument that it is a derivative work and not a transformative work. The further you get away from the original expression and are adding additional expressions and creativity, then it is more likely that it will be considered transformative. The second consideration that the court will look at is to determine if the use is commercial or noncommercial. In Harper & Row Publishers, Inc. v. Nation Enterprises, the Supreme Court stated that one’s use for commercial purposes is less likely to be deemed fair use than a use for non-commercial purposes.\(^{106}\) The Harper Court stated that a use is considered “commercial” if the “user stands to profit from exploitation of the copyrighted material without paying the customary price.”\(^{107}\) The Court in

\(^{99}\) See supra note Section IV(a).

\(^{100}\) 17 U.S.C. §107.

\(^{101}\) See id.

\(^{102}\) Id.


\(^{104}\) The more transformative a work, the more likely it would be to fall under fair use.

\(^{105}\) A parody refers back to the work it was using to make a comment about it. This is different than a satire, which uses the original work to gain attention, but not to comment on it.

\(^{106}\) 471 U.S. 539 (1985).

\(^{107}\) Id. 542-543.
"Harper" also mentioned another consideration that the Court will look to. The Court looked to the good faith of the user. If the user was knowingly acting in bad faith, or unethically, the Court would weigh against allowing a fair use defense.

With regard to the second fair use factor, the nature of the copyrighted work, the Court in "Harper" emphasized the importance of the published or unpublished status of the work. If you publish an author’s work without authorization, before she wanted to, it undermines an author’s determination of when she wishes to publish her work. Unauthorized publication has been frequently viewed as unfair. Another consideration when determining the nature of the work, is whether the work is one of fact or fiction. Facts are not copyrightable, so one is allowed to copy or publish facts as they choose because there is a greater need to disseminate those works. However, it is the expression of those facts that is copyrightable. For very creative and expressive works, such as a dance, the courts would generally weigh this factor in favor of the copyright holder and against fair use.

The third factor, the amount and substantiality of the portion used, is not defined as a set amount of the work you are allowed to use. When looking at this factor, courts examine the amount and substance of the work in totality. Courts will not only look to the quantity of the materials used, but also to the quality and importance of what was used. The Court in "Harper" stated that one who takes a short but substantially important portion of a work may be denied a fair use defense. Taking a portion of a work that may be considered the climax, or “heart” of the work, can sometimes be considered unfair, regardless of how much of the original work it constitutes. An important question courts will ask is whether one copied more than what was necessary to accomplish her purpose. If so, that is an argument against a fair use defense.

The fourth factor mentioned in the Copyright Act is the effect of use upon the potential market for the copyrighted work. The Court in "Harper" mentions that this factor is generally the most important to consider. Here you look at the extent of the market harmed by the copying, both for original and market for derivative works. Also, you can look to the impediment the copying would have on licensing revenues. Evidence of either actual or potential harm to the original copyright holder’s market will sway a court away from allowing a fair use defense. It is important to note that this factor is not meant to inhibit criticism of a work, but rather protect a copyright holder when someone’s other work dilutes the demand for the original work.

Though the Copyright Act only mentions these four specific factors, they are not exclusive or determinative in any situation. No single factor is conclusive in determining whether a use is fair. Courts look at fair use on a case by case basis and

108 See id.
109 See id.
110 See id.
111 For example, using 20% of a work could weigh just as much against fair use as using 80%, depending on what portion of the work was used.
112 See id. at 565.
113 See id. at 566.
often introduce additional considerations as necessary. Courts also weigh these factors in light of the purpose of copyright.  

Likely due to the non-lucrative nature of choreography, a court has never ruled on a fair use defense in regards to a dance. However, due to the strong customs in the choreographic community, a court would likely take these customary considerations into account when evaluating these four factors.

The United States Copyright Office states that “the safest course is always to get permission from the copyright owner before using copyrighted material. The Copyright Office cannot give this permission . . . When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of fair use would clearly apply to the situation.”

V. Customs in the Choreographic Community

Even though today, choreography is expressly protected by copyright law, “the vast majority of choreographers, particularly those less successful financially or those working primarily within the confines of their own dance community, have not pursued the opportunity to register their works under the new Act.” Although the dance world has recently experienced a fairly rapid growth in popularity with the emergence of new television programs such as “So You Think You Can Dance?” and “Dancing With The Stars,” dance is still far from becoming an economically booming industry like music and film. Other than the dance hot-bed of New York City, the audience for dance performances tends to be scarce around the rest of the country. If a choreographer is able to put on a show outside of New York City, all of the show’s profits are usually eaten up by the high cost of mounting the production, resulting in the choreographer being seriously underpaid.

A choreographer’s most important assets are her dances and reputation. A choreographer’s repertory and actions within the choreographic community defines her reputation. Without her works, she is unknown and unsuccessful. In this case, success is not defined by any financial gain, but by receiving recognition and having her dance’s preserved. However, in a community where it is accepted that choreographers are influenced by others, and it is widely acknowledged that “very few ideas, if any, are truly

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114 See supra Section IV. To promote the progress of the arts.
117 See id. at 291.
118 See id.
119 See id.
120 Abitabile, supra note 66, at 59.
121 See id.
122 See id.
123 In the questionnaire, I asked the choreographers, “How much can you use of another choreographer’s work.”
novel (i.e., they have been thought of or done before),” the only way to truly preserve one’s dance is to seek copyright protection.\textsuperscript{125}  

Choreographers have avoided the statutory means for enforcing their legal rights because they are unaware of how copyright law works.\textsuperscript{126}  Instead, they rely on the customs of their own community, believing that they afford them equal, if not greater, protection for their works.\textsuperscript{127}  

For those who create works merely for the love of the art, and without economic incentive, the copying of their work is likely tolerated, and sometimes welcomed,\textsuperscript{128}  as long as the accepted customs are followed. When asking a choreographer what they do if they incorporate any portion of another’s work into their own, it was a common consensus that one should always give attribution when using the work of another.\textsuperscript{129}  With the lack of economic incentive in mind, it seems that all choreographers are asking for in return for using their work is credit. Lasting choreographic credit is the reward that the dance community awards to deserving choreographers.\textsuperscript{130}  The choreographer’s name will forever be fixed to her work whether it is the first performance, or whether the choreographer has legal ownership in the work.\textsuperscript{131}  This idea conflicts with the statutory ideas of duration and the public domain, but choreographers believe that crediting another, even long after they are dead, helps teach and preserve the culture.  

Even with an economic incentive in mind and a relatively low cost of registering a work, many choreographers fear that the cost of litigating a copyright infringement suit would be far too high.\textsuperscript{132}  Thus, choreographers will never have the incentive to protect their works, knowing they will never be able to afford to exercise their rights.\textsuperscript{133}  

In performances that showcase dances of another, much of the dance community relies on contracts or licenses to perform the work. Whether a dance company wishes to hire a guest choreographer to set an existing work on their dancers or to choreograph something new for the company, a license or contract usually sets out the conditions for the performance. With the number of contracts and licenses to perform another choreographer’s work that are in existence at any one time, there likely have been a number of breaches. However, there has been virtually no case law on a breach of contract concerning choreography. It seems as if

\textsuperscript{124} \textit{Id.}  
\textsuperscript{125} \textit{See Abitabile, supra note 66, at 59.}  
\textsuperscript{126} \textit{See Singer, supra note 72, at 290.}  
\textsuperscript{127} \textit{See id.}  
\textsuperscript{128} In the questionnaire, I asked the choreographers, “How much can you use of another choreographer’s work?” One choreographer replied, “I consider imitation to be the highest form of flattery.”  
\textsuperscript{129} In the questionnaire, I asked the choreographers, “How much can you use of another choreographer’s work.”  
\textsuperscript{130} \textit{See Singer, supra note 72, at 292-293.}  
\textsuperscript{131} \textit{See id.}  
\textsuperscript{132} \textit{See Abitabile, supra note 66, at 59.}  
\textsuperscript{133} \textit{See id. at 60.}
“[c]horeographers . . . have a licensing custom strong enough to protect them from most unauthorized use of their choreographic works.”134

A. USE OF MUSIC

Music has many beneficial uses in the world of dance: it helps keep a beat, it helps set the mood of the dance, and it adds to the overall performance of a work. However, “lots of choreographers do not get permission to use music because it is really confusing and expensive.”135 As previously discussed136, the fact that dance is not an art form driven by money, many choreographers disregard all copyright laws and normally use whatever music they think will fit their work. Often times, “[choreographers] get inspired by a certain song, which helps give [them] the ability to create a dance from it.”137 With the recent commercial success and growth of dance in mainstream media, it may be smart for choreographers, especially ones who have some economic incentive behind their art, to start becoming aware of how to avoid liability from the music industry.

The best way to protect yourself is by obtaining permission from the artists whose songs you use. There are a number of ways to do this, such as trying to contact the artist directly, though this may be difficult if you use songs from world renowned artists. However, there are two popular music performing rights organizations in the United States: BMI (Broadcast Music, Inc.) and ASCAP (American Society of Composers, Authors, and Publishers). These organizations act as representatives for the artists that create the music you wish to use in your dances, so that when you want to use their music, you don’t have to attempt to track down each individual artist. For example, as a dance instructor, a license could give you permission to use the songs covered by the different organizations in your classes and performances.

BMI makes it clear that just because your dance studio is an educational facility, fair use does not allow you to use music in your classes, without one of their licenses.138 As a dance instructor, or owner of a dance school, it would absolutely be a good idea to purchase a license such as this; however, what is an individual choreographer to do about using music in their works? A search on BMI’s website for a license for a “choreographer,” yields no results. On ASCAP’s website it states, “ASCAP does not license ‘dramatic’ rights, sometimes called ‘grand’ rights. ASCAP members who write musical plays, operas or ballet scores deal directly with

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134 Singer, supra note 72, at 296. “Community sanction or the philosophy of the risk of the trade resolves most of those violations that do occur. For the majority of choreographers, then, there is no need for resort outside the dance community for protection of choreographic works.” Additionally, “[f]ew choreographers consider seeking a legal remedy for breach of a licensing contract,” for reasons such as cost of litigation. Id.

135 Questionnaire response.

136 See supra Section V.

137 Questionnaire response.

138BMI: Music Licensing for Dance Classes, http://www.bmi.com/licensing/entry/534514?q=Dance+Instructor (last visited April 18, 2011). “The exemption in the copyright law only applies to nonprofit educational institutions. Studios that are using music and profiting from the performances must obtain proper licensing of those performances.”
those who want to perform their works "dramatically." Many choreographers recognize that they are likely violating the copyright of these songs, but what are they supposed to do, call Lil Wayne?

Using music in their dances is a risk that most choreographers are willing to take, due to the complexity of gaining a license. It is also not helpful that two of the biggest music licensing companies provide little guidance on the subject. However, there are a few ways that a choreographer could help mitigate that risk. The first is to use music that is already in the public domain. The copyright on music in the public domain has expired, therefore making it free to use. The second is to try to find local artists that are willing to grant permission to use their music. Local musicians are both easier to contact and usually more than willing to allow another local artist to use their music free of charge. "It was flattering to me . . . to be able to see a dance choreographed to one of my songs. It also helps spread my [work] to the public.”

VI. Conclusion

With a lack of an economic incentive, choreographers generally see no benefit from seeking statutory copyright protection or working in conjunction with the law. However, imagine if Shakespeare had never written down his plays, if the Beatles never recorded any songs, if Van Gogh never painted any paintings? Fixation of a dance not only allows a choreographer to assert her statutory rights, but it also preserves her work indefinitely. There is no reason why choreographers shouldn’t fix their work today, and if choreography is your job, there is no reason not to register your work. Exercising your rights as a copyright holder is also extremely important. Even, if your motive is not to make money, granting a license to perform your work for merely attribution could be invaluable to your reputation in the dance community. Choreographers should take the initiative to be aware of the laws that protect the work that they invest so much of themselves in. Satisfying the legal requirements for copyright will not only protect you legally, but will also allow you to preserve, share, and teach others your art for years to come.


Though often times, the recorded performance of public domain work have themselves yet to reach the public domain.

Interview with local musician, and UNC Law Class of 2008 Alumnus, Ryan T. Bliss.

See Lula, supra note 26, at 186.

See supra Section IV(c).