

Bodies in Motion: Contemplating Choreography and Copyright Law

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Extended Abstract:

The viral success of “Gangnam Style” stirred up discussion in the blogosphere about copyright in the musical work, which was reproduced and disseminated by millions worldwide. While many queried the lawfulness of those amateur reaction and parody videos that reproduced the musical track, or applauded Psy for his decision to allow their proliferation, there was relative silence about the lawfulness of mimicking Psy’s distinctive dance moves. The notion that the public “flash mobs” or “dance bombers” circling one hand over their heads while maniacally hopping sideways ought first to have obtained the permission of Psy (or, more likely, his choreographer) could seem absurd. It would, however, have been sound legal advice.

The fact that choreographic works attract copyright protection is not controversial in itself. Yet, almost every core element of copyright doctrine sits uneasily with the practices and processes of choreography. What is original expression in the context of a dance tradition, where familiar steps and routines are repeated and recombined against the backdrop of tradition? In what circumstances should one person’s copyright prevent another from participating in a cultural phenomenon by moving her body in a certain way? What is choreographic authorship as distinguished from performance, and in what circumstances might the performer become the author? What is “the work,” and how is it identified, when dance is by nature dynamic and ephemeral? What is fixation, and why does it matter, in a performance-based medium where ideas find materiality in the bodies and minds of dancers?

The conceptual difficulties encountered in answering these and other questions illuminate the poverty of the legal constructs we employ to understand creativity in the world of dance, and beyond. The purpose of this paper, then, is not only to explore the complexities of applying copyright to choreography, but to employ choreography as a conceptual site within which to critically assess copyright’s central assumptions about the processes and products of authorship. As an area of cultural creativity still relatively untouched by the force and effect of copyright law and litigation, the realm of dance may also operate as an example of what collaborative, cumulative creativity can look like when the legal norms do not appear to apply either in practice or in principle.

*"Dance exists at a perpetual vanishing point. At the moment of its creation it is gone.... No other art is so hard to catch, so impossible to hold."*¹

I. INTRODUCTION

In summer of 2012, South Korean pop musician, Psy, released his music single 'Gangnam Style.' By December of the same year, his music video became the first one ever to attract one billion *You Tube* views—a number that has now more than doubled.² The popularity of the video was due not only to the track's catchy beat, but also to Psy's "amusing dance moves,"³ including the famous horse-riding dance, which became an instant classic, recognized and replicated around the globe. It been performed by the rich and famous, from Presidents to sports stars;⁴ it has been used for political causes, from Greenpeace to Guantanamo;⁵ and it has spawned thousands of user-generated reaction and parody videos, featuring everything from flash mobs in city centers to solitary individuals dance crashing school cafeterias.⁶ As the craze spread, many in the music industry wondered whether we were witnessing the future of music marketing success in the digital world.

¹ Marcia B. Seigel, *At the Vanishing Point: A Critic Looks at Dance* (New York: Saturday Review Press, 1972) at 1.

² See http://en.wikipedia.org/wiki/Gangnam_Style (visited on 21 July 2014).

³ *Ibid.*

⁴ The list of dignitaries who have claimed to have performed the dance includes Barrack Obama, David Cameron, and [United Nations Secretary-General Ban Ki Moon](#) (who reportedly hailed it as a "force for world peace": see "Gangnam Style Gets UN Stamp of Approval, Sydney Morning Herald, 10 October 2012, available at: <http://www.smh.com.au/digital-life/digital-life-news/gangnam-style-gets-un-stamp-of-approval-20121010-27cbq.html>). Sports stars who have performed the dance include boxer Manny Pacquiao and tennis player Novak Djokovic. See *ibid.*

⁵ Greenpeace posted a parody version filmed on board its Rainbow Warrior ship, available at: <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/gangnam-greenpeace-style/blog/43471/?entryid=43471>. Guantanamo Bay inmate, [Muhammad Rahim al Afghani](#) reportedly cited the Gangnam Style video as an example of his ability to learn about pop culture trends despite his confinement; he offered to do the dance provided that his shackles were removed. (See Ben Fox "A lesson in pop culture via Guantanamo", Associated Press, 13 December 2012: <http://bigstory.ap.org/article/lesson-pop-culture-guantanamo>).

⁶ By way of example, Noam Chomsky and other notable MIT professors in the MIT Parody version, available at: <https://www.youtube.com/watch?v=IjTHNEDnrnY>. Student David Kim also posted a version filmed on my home campus of York University, Toronto: <https://www.youtube.com/watch?v=FFVsrhETxkg&feature=youtu.be> NASA Astronauts at Mission Control Centre in Houston Texas also created another popular spoof version: see http://www.nbcnews.com/id/50230748/ns/technology_and_science-space/#.U9fmrG3LLuo.

Rather than exercising his exclusive right to control reproduction and public performance, as protected around the world by copyright law, Psy was able to rake in an estimated \$8 million US dollars through advertisements appearing on *You Tube* in connection with any video identified as having “Gangnam Style” in its content.⁷ Meanwhile, it is reported that Lee Ju-sun, the relatively little known choreographer behind the famous dance moves, was paid a “minuscule” percentage of the money in a lump sum by Psy when Ju-Sun began teaching him the dance—and had no legal basis on which to claim more (although Psy reportedly paid him a cash ‘bonus’ upon the unanticipated success of the video).⁸

The viral spread of Gangnam Style stirred up discussion in the intellectual property blogosphere about the role and relevance of copyright in the musical work and sound recording. Many queried the lawfulness of those amateur dance videos that reproduced the musical track, while others applauded Psy and his music label for their canny choice to maximize rather than restrict dissemination as a key to ultimate economic success in the internet age.⁹ There was, in stark contrast, virtual silence on the subject of Psy’s distinctive dance moves. The notion that the public “flash mobs” or “dance bombers,” circling one hand over their heads while maniacally hopping sideways, ought first to have obtained the permission of Psy (never mind Ju-sun), likely did not cross the minds of most. Strange though it may seem, however, it would have been sound legal advice.

Choreographers have long been accustomed to existing at the blurry margins of the copyright system. As Barbara Singer wrote in 1984, the law “has been content to treat dance as the black sheep of the arts.”¹⁰ It was not until 1976 in the United States, and arguably as late as 1988 in Canada, when choreographers’ original works were explicitly granted the protection of copyright law in their own right, without having to squeeze into another recognized category of expressive work. Notwithstanding the recent proximity of

⁷ See Youkyung Lee and Ryan Nakashima, “Psy’s Riches From ‘Gangnam Style’ Not Made At Home”, Associated Press, 5 December 2012, available at: <http://bigstory.ap.org/article/cashing-gangnam-styles-youtube-fame>.

⁸ Park Si-soo, “What about the Choreographer of Gangnam Style?”, Korea Times, 6 February 2014. Available at: <http://www.koreatimesus.com/?p=6942>.

⁹ See, e.g. Emma Lunn, “How Psy Made £16 Million from his Youtube success”, Yahoo Finance, 11 June 2013 available at: <https://uk.finance.yahoo.com/news/how-psy-made-16m-from-youtube-success-155917055.html>

¹⁰ Barbara Singer, “In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community”, 38 U. of Miami L. Rev. 287 (1984) at 288.

such statutory developments, the fact that choreographic works attract copyright protection is surprisingly uncontroversial. Choreography is widely understood to be “the art of creating and arranging dances or ballets.”¹¹ As a creative and artistic endeavor, the protection of choreographic works by copyright thus seems a natural fit for a body of law concerned with the “progress of the arts”¹² and the encouragement of “works of the arts and intellect.”¹³ As such, the vast majority of the scholarly literature concerned with the copyrightability of choreography is focused on the failings and flaws of a system that offers inadequate protection to choreographic works and their authors.¹⁴ The widely held view—and one that finds support in the story of Lee Ju-Sun—is that choreographers, as a category of creators, are disproportionately disadvantaged by many of the core definitions and preconditions of copyright. This view is certainly not without foundation; indeed, it is supported by much of the discussion that follows. As we will see, almost every core element of copyright doctrine, from determining originality to establishing infringement, sits uneasily with the practices and processes of choreography.

I mean to explore, in this paper, just a few of the many ways in which choreography copyright challenges the basic structures and strictures of copyright law. However, the purpose of this paper is not only to consider the complexities—and inadequacies—of copyright as it applies to choreography (which others have done in more detail),¹⁵ but to employ choreography as a conceptual site within which to critically assess some of

¹¹ The American Heritage Dictionary of the English Language (4th Edition). Derived from the Greek for “dance” and “write,” its early meaning as a written record of dances. By the 19th century the term was used mainly for the creation of dances, and the written record became known as dance notation. See Merriam-Webster Dictionary, online at: <http://www.merriam-webster.com/dictionary/choreography>.

¹² U.S. Const. art. 1, § 8, cl. 8.

¹³ *Théberge v. Galerie d'Art du Petit Champlain Inc.* [2002] 2 S.C.R. 336, 2002 SCC 34, per Binnie J. at para. 30.

¹⁴ See e.g. Matt Kovac, “Copyright and Choreography: The Negative Costs of the Current Framework for Licensing Choreography and a Proposal for an Alternative Licensing Model”, 36 Hastings Comm. & Ent. L.J. 137 (2013-2014) at 145. Singer, “Dance Communities” *supra* note 10.

¹⁵ See, e.g., G. Ordway, Choreography and Copyright, 15 ASCAP Copyright Law Symposium 172, 177-78 & n. 20 (1967); Martha M. T aylor, “Choreography, Pantomime and the Copyright Revision Act of 1976”, 16 New Eng. L. Rev. 227 (1980-1981); B. Singer, *supra* note 10; Leslie Wallis, “The Different Art: Copyright and Choreography”, 33 UCLA L. Rev. 1442 (1985-1986) [“Different Art”]; Anne Weinhardt, “Copyright Infringement of Choreography: The Legal Aspects of Fixation”, 13 J. Corp. L. 839 (1987-1988); Adaline Hilgard, “Can Choreography and the Copyright Waltz Together in the Wake of Horgan v Macmillan, Inc.?”, 27 U.C. Davis L. Rev. 757 (1994); Julie Van Camp, “Copyright of Choreographic Works”, *Entertainment, Publishing and the Arts Handbook* 1994-1995 (Stephen F. Breimer, Robert Thoerne & John David Viera Eds., 1994), 59-92.

copyright's central assumptions. In a sense, I will argue, the art of choreography exemplifies the failure of copyright law to reflect the realities of human creativity (in relation to others), the nature of expressive works (in time and space), and the limits of proprietary structures (in reifying and controlling cultural texts). Moreover, as an area of cultural creativity in which more reliance is placed on social and community norms than copyright restrictions, choreography remains relatively untouched by the force and effect of copyright law and litigation. It may also operate, then, as an example of what collaborative, accretive, cultural creativity can look like when the legal norms do not appear to apply either in practice or in principle.

II. THE STATUTORY BACKDROP: THE COPYRIGHTABLE CHOREOGRAPHIC WORK

Dance may be one of the world's oldest art forms but, as suggested above, the history of copyright in choreographic works is a relatively brief one, at least in North America.¹⁶ Prior to the enactment of the *Copyright Act* of 1976, choreographic works were eligible for copyright in the United States only when they fell into the category of "dramatic or dramatico-musical compositions," thereby requiring that the work "told a story, developed or characterized an emotion, or otherwise conveyed a dramatic concept or idea."¹⁷ The first successful registration of a choreographic work with the U.S. Copyright Office was in

¹⁶ Choreography was added as a category of protected work under the *Berne Convention* in 1908. Article 3 read: "The expression 'literary and artistic works' shall include any production in the literary, scientific or artistic domain...such as dramatic and dramatico-musical works, choreographic works and entertainments in dumb shows the acting form of which is fixed in writing or otherwise." This language was added to the British *Copyright Act, 1911*, and then replicated in Canada's *Copyright Act, 1921*. See Laurent Carriere, "Choreography and Copyright: Some Comments on Choreographic Works as Newly Defined in the Canadian Copyright Act", §5.1.2, available at: www.robic.ca/admin/pdf/279/105-LC.pdf ["Choreography and Copyright"].

¹⁷ *Horgan v. Macmillan Inc.*, 789 F.2d 157, 160 (2d Cir. 1986) [*Horgan*], citing G. Ordway, *Choreography and Copyright*, 15 ASCAP Copyright Law Symposium 172, 177-78 & n. 20 (1967). Another very important development for US choreographers and authors in general, which came with the enactment of the 1976 Act, was the removal of registration formalities, such that copyright came to vest automatically at the moment that a work is "fixed" in a material form. As I will discuss in more detail below, however, authors of other kinds of work, whose creation typically and naturally coincides with the act of fixation, stood to reap greater benefit from this development than did choreographers.

1952 for the choreography for the musical “Kiss me Kate”, by Hanya Holm.¹⁸ Prior to 1976, however, other choreographers failed to assert copyright before the courts due to the missing dramatic element.¹⁹ The 1976 Act expressly including “choreographic works” as a separate category of protected work, though one without definition. The compendium of Copyright Office Practices, *Compendium II* (1984), defines choreographic works in the following terms:

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.

Further contours of the definition are afforded by express exclusions:

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 ballets steps alike may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic materials.

The explicit exclusion of social dance steps and simple routines, based on a statement in the House Report, has been criticized for defining choreography purely in the negative, with the result that “we know what a choreographic work is not, but not what it is.”²⁰ Arguably, the distinctions drawn here are further complicated by the exclusions specified in a 2012 Statement of Policy issued by the Copyright Office: “A mere compilation of physical movements does not rise to the level of choreographic authorship unless it contains sufficient attributes of a work of choreography.” Thus, copyright can attach to the “composition and arrangement of a related series of dance movements and patterns organized into an integrated, coherent, and expressive whole” but not to “the mere

¹⁸ See Matt Kovac, “Negative Costs” *supra* note 14 at 145; citing Julie Van Camp, “Choreographic Works” *supra* note 15 at n. 2.

¹⁹ See, e.g. *Fuller v Bemis*, 50 F. 926 (C.C.S.D.N.Y. 1892), in which protection against copying was refused on the basis that the plaintiff’s dance was “devised to convey to the spectator no other idea than that a comely woman illustrating the poetry of motion in a singularly graceful fashion, and while such an idea may be pleasing, it can hardly be called dramatic.” *Ibid.* at 929.

²⁰ Leslie Wallis, “The Different Art: Copyright and Choreography”, 33 UCLA L. Rev. 1442 (1985-1986) at 1452.

selection and arrangement of physical movements.”²¹ These statements, cited recently as authority for denying copyright to Bikram Choudury’s yoga sequence,²² attempt to distinguish between an original compilation of unprotectable dance steps (copyrightable) and an original compilation of unprotectable physical movements (uncopyrightable). In doing so, they come closer to begging the question than answering it. The exclusions hint at an unspoken but perhaps unavoidable aesthetic judgment in defining the outer limits of choreography and dance—giving rise to charges of elitism²³ and suggestions of “a legally imposed standard of artistic merit.”²⁴

In Canada, choreographic works have long been included within copyrightable subject matter as a sub-category of dramatic work.²⁵ Prior to 1988, however, and the addition of a statutory definition of “choreographic work”, it was unclear whether a choreography without a dramatic character—a plot of storyline—could be protected as a dramatic work.²⁶ The statutory definition of choreographic work in Canada’s *Copyright Act* now reads: “Choreographic work” includes any work of choreography, whether or not it has any storyline.”²⁷ While the definition appears to remove the nexus with ‘drama’ in a substantive sense,²⁸ choreographic works remain, in Canada, a specific sub-category of works within the more general definition of “dramatic works” (which includes “(a) any piece for recitation, choreographic work or mime, the scenic arrangement of acting form of which is fixed in writing or otherwise.”) In this strict sense, it might be said that choreography in Canada, in contrast to in the United States, continues to be “a mere stepchild of drama.”²⁹

²¹ 77 Fed. Reg. No. 121 at 37607 (12 June 2012) [2012 Statement of Policy].

²² *Bikram’s Yoga Coll. of India, L.P. v. Evolation Yoga, LLC*, No. 2:11-cv-5506-ODW (SSx), 2012 WL 6548505 (C.D. Cal. Dec. 14, 2012) [*Bikram Yoga*] (currently on appeal to the Court of Appeal for the Ninth Circuit)

²³ See, e.g. Kraut, “Stealing Steps”, *supra* note 23 at 178.

²⁴ Melanie Cook, “Moving to a New Beat: Copyright Protection for Choreographic Works”, 24 UCLA L. Rev. 1287 (1977) at 1299[‘New Beat’]; cited in Kraut, “Stealing Steps”, *ibid*.

²⁵ Prior to these enactments, copyright in the performance of choreographies as dramatic works was protected in Britain and Canada by virtue of the UK *Dramatic Copyright Act, 1833*, and the UK *Literary Copyright Act, 1842*. Carriere, “Choreography and Copyright” *supra* note 16 at §5.1.3.

²⁶ David Vaver, “The Canadian Copyright Amendments of 1988”, 4 Intellectual Property Journal 122 (1989) at 144-5; cited by Carriere, “Choreography and Copyright” *supra* note 16 at §5.1.2.

²⁷ R.S.C. 1985 (4th Supp.), c. 10, s. 2.

²⁸ Carriere, “Choreography and Copyright” *supra* note 16 at §5.1.1.

²⁹ Singer, “Dance Community”, *supra* note 10 at 288.

Canadian choreographers do, however, have one clear advantage over their US counterparts when it comes to the bundle of rights to which they can lay claim: under Canada's *Copyright Act*, choreographers, like any other author, can claim moral rights in respect of their works. Thus, a choreographer has the right, where reasonable in the circumstances, to be associated with the work as its author in connection with any act of reproduction, public performance or first publication. Furthermore, the choreographer can assert the right of integrity to prevent the distortion or modification of her work, or its use in association with a product, service, cause or institution, in a manner prejudicial to the choreographer's honour or reputation.³⁰

Adding an interesting layer to the rights at play in respect of choreography are performers' neighbouring rights in their performances, which also receive broad statutory protection in Canada. Thus, the dancer of the choreography has the sole right, in relation to her performance, to communicate it to the public by telecommunication and to fix it in a material form³¹—the latter being a right that could, at least theoretically, be asserted even against the choreographer attempting to perfect her copyright in the choreography through fixation. It bears emphasis that, in the case of an unfixed performance, the performer has greater rights than the choreographer. If the performance is fixed, the performer has the exclusive right to reproduce any unauthorized fixation, and to prevent reproduction for purposes other than those for which fixation was permitted.³² Where the performance is filmed with the performer's permission, she may also enjoy a right to remuneration in respect of its reproduction or public performance.³³ And finally, in a recent addition to Canada's copyright law, the performer may now assert her own moral right to the integrity of the performance, and to be associated with the performance by name, unless those rights are waived.³⁴ While a full consideration of performers' copyright and moral rights is beyond the scope of this paper, it is worth emphasizing that this added layer of performers' rights may complicate the task of the choreographer in recording and disseminating her work. The dancers are not, in this respect, merely the choreographer's

³⁰ Canada's Copyright Act 1985, *supra* note 17, at ss. 14.1 and 28.2.

³¹ *Ibid.*, s 15(1)(a).

³² *Ibid.*, s 15(1)(b).

³³ *Ibid.* s 17(1).

³⁴ *Ibid.* s 17(1.1).

creative material; they are recognized in law as independent bearers of rights in their own expressive act. These rights may complement—but could also restrict—the activities of the choreographer in respect of her original work.³⁵

III. THE LIMITS OF ORIGINALITY IN CHOREOGRAPHY

It is, by now, well settled that copyright protects choreographic works, and it does so subject only to the same requirements and limits that apply to any copyrightable subject matter: the work must contain original expression that is fixed in a material form. As Leslie Wallis has remarked, however, “[d]ance is so dissimilar from other works of authorship that to categorize it with other works is to attempt to force to fit within the rules for other works....”³⁶ Given the unique characteristics of dance as an expressive form, the application of copyright concepts—and the scope of the choreographer’s copyright claim—is inevitably uncertain. The continuing paucity of case law in this field (itself indicative of the significant fact that most choreographers eschew the available statutory protection), means that many questions remain about precisely what is protected and what belongs in the public domain free for all to use. Any doctrinal examination of copyright’s reach will inevitably present even more significant questions about the extent to which copyright can mesh with the realities of creative practice and prevalent norms in the dance community and beyond. In this section, I will survey some of these sites of uncertainty, with a view to problematizing the simple notion of the protected—and propertized—choreographic work.

Originality is the precondition of copyright protection—its ‘very premise’³⁷—and is thus the defining characteristic of copyrightable expression. Irrespective of the particular formulation of originality adopted by different courts or in different jurisdictions, one

³⁵ For an interesting discussion of the relationship between authors, performers and moral rights in the context of musical works, see Mark L. Rudoff, “The Dancer and the Dance: An Essay on Composers, Performers, and Integrity Rights”, 29(4) *Alberta L. Rev.* 884 (1991).

³⁶ Wallis, “The Different Art”, *supra* note 20 at 1445.

³⁷ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991), 499 U.S. 340 at 347 (1991) (quoting *Miller v. Universal Studios, Inc.*, 650 F.2d 1365 at 1368 (5th Cir. 1981)) [*Feist*].

attribute is required by all: namely, that the work originates from the author; it must be independently produced and not copied from any other source.³⁸ In the United States, originality also requires a “minimal degree of creativity”³⁹ while, in Canada, the standard is one of skill (knowledge, developed aptitude or practised ability) and judgment (in choosing between different possible options).⁴⁰ By any standard, the question presents itself: how should we understand originality in the context of dance, where the same steps, movements and routines are repeated, rearranged, and incrementally developed over time and space, and in a manner often constrained by style and genre?

The originality question becomes increasingly problematic when we add into this picture the importance of influence within the dance community: choreographers tend to be highly influenced by their dance training and adhere, in their work, to certain schools or techniques of dance movement.⁴¹ Because the originality standard does not demand novelty, faithfulness to established conventions or forms does not in itself preclude originality in the copyright sense. Nor would the fact that a choreographer uses only unoriginal steps common to the genre prevent a finding of originality. The analogy is often drawn between choreography and musical composition: the original choreographer selects and arranges common or standard moves into an original dance, just as the composer selects and arranges notes or chords into original melodies.⁴² Both are limited, in their creative freedom, by structural constraints, conventions of the genre, and audience preferences; but the act of re-arranging and recombining the existing materials is itself an act of original authorship. On the other hand, the mere use of typical, or even just previously recorded, patterns of movement or combinations of steps would be sufficient to undermine a claim to originality. Julie Van Camp explains, for example, that “a series of turns *a la seconde* followed by multiple *pirouettes*, common in so many male solo variations

³⁸ At its most minimal, originality ‘does not require that the expression must be in an original or novel form but that the work must not be copied from another work – that it should originate from the author’: *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601 at 608-09, Peterson J.

³⁹ *Feist*, *supra* note 37 at 345.

⁴⁰ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339 [CCH] at para 16.

⁴¹ Thomas Overton, “Unravelling the Choreographer’s Copyright Dilemma”, (1982) 49 Tennessee L.Rev. 549 at 601.

⁴² See, e.g. Adeline J. Hilgard, 27 U.C. David L. Rev. 757 (1993-1994) at 765; Van Camp, “*Choreographic Works*”, *supra* note 15 at 64.

in ballet” belongs in the unprotectable public domain.⁴³ An entire work that is “so simple or so stereotyped as to have no substantial element of creative authorship” may fail to meet the threshold for protection⁴⁴ (though such instances would, I think, be rare). In any event, original combinations of common elements should give rise only to the “thin” copyright of compilation works, such that the choreographer’s claim cannot extend to prevent others from engaging in their own original process of re-arranging and recombining such pre-existing elements into a new work.⁴⁵

Nothing in this description of the application of originality to choreographic works is uniquely problematic. As with any kind of work, non-original elements of choreography, whether borrowed directly from another work or from the “common stock” of choreographic steps and movements, are not within the scope of the owner’s right. The process of selecting or arranging such common elements in a manner that involves creativity or more than trivial skill and judgment will produce a copyrightable work.⁴⁶ The difficulty inevitably lies in determining what qualifies as original to whom in any particular case. Of course, the many constituent elements of an entire ballet production, choreographed by the likes of George Balanchine, would be, in combination, the choreographic equivalent to a great novel, no doubt deserving of protection as an original work. But copyright vests in literary works that fall infinitely short of such accomplishments: tax forms, accounting tables, software code, advertising slogans, user manuals, and so on. What are the choreographic equivalents to these minimally creative, essentially utilitarian, works? At what point does the mere combination of unoriginal steps, as basic building blocks of dance, cross into the realm of original choreographic work?

It would seem that a basic combination of steps or poses could be denied copyright notwithstanding the low originality threshold if, even in combination, the resulting work is

⁴³ Ibid.

⁴⁴ Borge Varner, “Copyright in Choreographic Works,” in Senate Comm. on the Judiciary, 86th Cong., 2d Sess., *Studies on the Copyright Law Revision* 94 (Comm. Print 1961) at 100; cited by Van Camp, “*Choreographic Works*,” *supra* note 15 at 63.

⁴⁵ See *Ladbroke (Football) Ltd v William Hill (Football) Ltd*, [1964] 1 All ER 465(HL), *Feist*, *supra* note 37.

⁴⁶ *CCH*, *supra* note 3 at para. 16.

determined not to be “choreographic” in nature.⁴⁷ However, in light of the skill and creative judgment involved in arranging just a few common *dance* steps into a fluid combination capable of performance,⁴⁸ it seems likely that the vast majority of fairly simple or relatively uninspired dance routines would rise without difficulty to meet the minimal threshold of originality. Given the general desire to avoid aesthetic judgments of the quality of a work in determining copyrightability, it may be tempting to set the bar for protection low. But then, with what force can it reasonably be argued that the creation of a simple flow of basic movements should grant the power to control and prevent the performance of substantially similar physical movements by others?

Copyright’s originality standard is typically easily satisfied by the merest intellectual effort in the selection and arrangement of expressive elements, however basic these may be. As such, it does little to police the gates of copyright protection. While the threshold is low, however, the idea of authorship that it represents—one of creativity without copying—plays a significant role in justifying the author-owner’s claim to right.⁴⁹ The presumption of independent origination represents a naïve conception of the processes of authorship in relation to any category of work. But in the context of dance, I would suggest, this divergence between the ideal of original authorship and the art of choreography is especially pronounced. In the next section, I hope to show why copyright’s emphasis on independent creation, and the private control that it confers, are a poor match for dance and its cycle of creativity.

IV. BORROWING AND THE CYCLE OF CREATIVITY

From both a practical and policy perspective, the proprietary claim over “original” contributions sits uneasily with common practice and shared norms within the dance

⁴⁷ *Bikram Yoga*, supra note 22; cp. *2012 Statement of Policy*, supra note 21.

⁴⁸ The distinction between dance steps and utilitarian poses is far less obvious or definable, I would suggest, than the Copyright Office’s *2012 Statement of Policy* appears to acknowledge.

⁴⁹ I have discussed the relationship between concepts of originality and the scope of copyright in greater detail elsewhere. See, e.g. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Cheltenham, UK, Northampton, Mass: Edward Elgar Publishing, 2011), Part II at 67-145.

community. Borrowing amongst choreographers and dancers appears to be pervasive and widely accepted. Ballet choreographer, Mark Morris, is quoted as saying, “I like to think that I’ve built on what’s gone before me... I certainly refer to it. And I don’t know if that’s homage or plagiarism. But I use things I like. And I often like things that have been done before.”⁵⁰ During the Senate committee hearings on copyright revision, the former head of the New York City Ballet and the School of American Ballet, Lincoln Kirstein, argued against copyright protection for choreography on the basis that copying was both inevitable and desirable: “Nothing can prevent dancers or observers from taking parts of these works and recombining them into new works.”⁵¹ After all, even Balanchine’s *Nutcracker*, the work at issue in the famous case of *Horgan v Macmillan, Inc.*⁵² and the archetypal example of propertizable choreography,⁵³ was a derivative work that incorporated significant portions of the nineteenth century production of the *Nutcracker* as choreographed by Lev Ivanov.⁵⁴

As we look beyond the traditional realm of ballet to other popular dance forms, the reality of creative borrowing becomes only more obvious—and, if done well, admirable. Speaking about the tap dance community in its hey-day, choreographer Leonard Reed described how, “[a]ll the dancers would hang out, and they would trade ideas. That was affectionately called ‘stealin’ steps.’ Everybody did it. That’s how you learned.”⁵⁵ Along similar lines, describing the development of the jazz dance phenomenon, the Lindy Hop, Frankie Manning asked, “how far would the dance have gone if people didn’t steal from each other? Back in the early ‘30s, there weren’t any dance schools that would even teach [it].... So the only way we could learn was by exchanging steps.... If we couldn’t steal...[i]t would have

⁵⁰ Quoted in Sally Banes, *Before, Between and Beyond: Three Decades of Dance Writing* (University of Wisconsin Press) at 203.

⁵¹ Staff of S. Comm. On the Judiciary, 86th Conf, Copyright Law Revisions: Studies 113 (Comm. Print 1961) (comments by Lincoln Kirstein); cited by Joi Michelle Lakes, “A Pas de Deux for Choreography and Copyright”, 80 N.Y.U. L. Rev. 1829 (2005) at 1834.

⁵² *Horgan*, *supra* note 17.

⁵³ See Caroline Joan S. Picart, “A Tango Between Copyright and Choreography: Whiteness as Status Property in Balanchine’s Ballets, Fuller’s Serpentine Dance and Graham’s Modern Dances”, 18 Cardozo Journal of Law & Gender 685 (2012) at 696-706 [“*Status Property*”].

⁵⁴ *Horgan*, *supra* note 17 at 158. See also Van Camp, “*Choreographic Works*”, *supra* note 15 at 75-76.

⁵⁵ Rusty E. Frank, *Tap! The Greatest Tap Dance Stars and their Stories, 1900-1955* (New York: Da Capo Press, 1994) at 42; cited in, “Stealing Steps” *supra* note 23 at 180.

stagnated right there in one spot....”⁵⁶ The so-called “challenge dance” of the tap and jazz forms, like the “dance battles” of today’s hip hop and krumping styles,⁵⁷ relied upon instant copying, spontaneous reinvention and competitive improvement (or, perhaps more accurately, one-upmanship) to establish the reputation of the dancer.⁵⁸

Even the most seemingly innovative, ground-breaking dances of our age—the ones that defined a generation and spawned decades of imitation—were highly derivative. Michael Jackson’s famous Moonwalk, for example, was arguably based on precedents drawn from the “tapping, sliding, and proto-moonwalking” of artists like Cab Calloway, Sammy Davis Jr, Fred Astaire.⁵⁹ In fact, the “backslide” was first recorded being performed by tap dancer Bill Bailey in 1955.⁶⁰ But rather than pouring over the footwork of these masters,” one commentator notes that the more likely influence—and the one acknowledged by both Jackson and his choreographer, Jeffrey Daniel—was American street dancers who were, in Jackson’s words, doing “a ‘popping’ type of thing that black kids had created dancing on the street corners in the ghetto.”⁶¹ Popping, a funk style of street dance that came from California in the 1960s and 70s, arguably became a foundation of Jackson’s era-defining dance moves, and continues to infuse popular dance today. Steffan “Mr. Wiggles” Clemente, a street dancer famed for his popping moves, captures this sense of dance’s incremental evolution when he explains, “Break dancing never went out of fashion, cos they’re all breakin’,

⁵⁶ Frankie Manning and Cynthis R. Millman, *Frankie Manning: Ambassador of Lindy Hop* (Philadelphia: Temple University Press, 2007) at 50; cited in Kraut, “Stealing Steps”, *ibid.*

⁵⁷ See <http://en.wikipedia.org/wiki/Krumping>; see also Taisha Paigett, “the Changing Face of Hip-Hop” available at <http://www.thefreelibrary.com/Getting+krumped%3A+the+changing+race+of+hip+hop.-a0118675205>.

⁵⁸ See Constance Valis Hill, “Stepping, Stealing, Sharing and Daring” in *Taken by Surprise: A Dance Improvisation Reader*, ed. Ann Cooper Albright and David Gere (Middletown, CT: Wesleyan University Press, 2003) at 93; cited by Kraut, “Stealing Steps”, *ibid.* at 181.

⁵⁹ See Ayun Halliday, “The Origins of Michael Jackson’s Moonwalk” at <http://www.openculture.com/2014/04/the-origins-of-michael-jackson-moonwalk.html>.

⁶⁰ See video of Bill Bailey’s 1955 Moonwalk at <https://archive.org/details/BillBailey>.

⁶¹ Halliday, “Moonwalk”, *supra* note [57], citing Michael Jackson *Moonwalk* (New York: Harmony Publishing Group, 1988) at 47. Jackson did, however, pour over the footwork of James Brown, ostensibly copying his moves “verbatim” in the early Jackson Five videos. See commentary of Rosie Perez and accompanying footage in documentary, *Dance in America: Everybody Dance Now*, (New York, NY: PBS WNET, 2 October 1991), available at: <https://www.youtube.com/watch?v=hP5UkvspSh8> [*Dance in America*].

poppin' and lockin'. If you look at the latest dance shows, rap videos... they're still doing it."⁶²

Contributing to this cycle of creativity is the development of communication technologies. As technology has evolved, dancers no longer have to hang out together at the dance club in the manner described by Rusty Frank in order to see (and copy) what others are doing. The advent of the modern music video and the launch of MTV in the early 1980s represented an important moment in the popularization and dissemination of dance. In an interview discussing the ground-breaking choreography in Michael Jackson's music videos, choreographer Barry Lather says: "Through video, everyone gets to see it. And if it's hip, everybody starts doing it. You try and get what's happening right on the street level, I mean clubs, y'know, funky or street steps or hip hop steps, and if you can give them to an artist, then everybody gets to see it."⁶³ This statement captures the circularity of choreographic creativity, which begins and ends "on the street level." An underground or "subculture" dance style incorporated into pop music video choreography can quickly become a dance craze, or even an international cultural phenomenon. Madonna's *Vogue* video, for example, brought "voguing" to the masses, mainstreaming what was already a subcultural dance phenomenon.⁶⁴

The advent of the internet and proliferation of video sharing sites has taken this creative cycle to a new level. In the last year or so, "twerking" emerged as a pop culture craze (with the word "twerk" being added to the Oxford Dictionary and awarded runner up Word of the Year in 2013), thanks (or no thanks!) mainly to a viral video and subsequent performances by pop star Miley Cyrus⁶⁵ (although even this assertion is open to dispute,

⁶² Commentary of Mr Wiggles in *Dance in America*, *ibid*. See also: http://en.wikipedia.org/wiki/Mr._Wiggles.

⁶³ See *Dance in America*, *supra* note 61.

⁶⁴ See Stephen Ursprung, "Voguing: Madonna and Cyclical Reappropriation" available at: <http://sophia.smith.edu/blog/danceglobalization/2012/05/01/voguing-madonna-and-cyclical-reappropriation/>. The practice itself was already an important part of New York's Drag Culture and part of large competitions in which Drag Queens would perform in competitions against each other. Again provide another example artistic practice being appropriated in the creation of iconic Choreography.

⁶⁵ See, e.g., Miley Cyrus Twerk, <https://www.youtube.com/watch?v=SaYd0KyJ08w>.

with Australian rapper Iggy Azalea accusing Cyrus of merely copying her dance moves).⁶⁶ The term (apparently derived from the combination of “twist” and “jerk”) and the moves it describes in fact emerged in the United States in the late 1990s in New Orleans, in the underground “bounce music” scene, and developed through hip hop videos and then video-sharing sites through the mid-2000s. Of course, like many “innovations” its origins likely extend well beyond that time, perhaps to the Mapouka dance from West Africa.⁶⁷ New dance moves or emerging dance styles are no longer confined to the localities in which they are performed, passed along only directly through the shared memories and present bodies of dancers, but are now posted on *You Tube* for potentially millions to see. They become something for others to emulate, as novel and more challenging moves are attempted, new combinations of steps and ‘flows’ develop, until we have a new style or genre of dance, and a new shared vocabulary of moves with which to continue to create.

Notably, for copyright purposes, in this cycle of creativity, it is not necessarily the person who makes a dance famous (nor that person’s choreographer) who can rightly claim authorship or ownership of the work under copyright law. As with Jackson’s famous moonwalk, the moves or combination of moves, are more likely to be copied than independently created: made famous by a pop star, who was instructed by a choreographer, who borrowed from street dancers, who were influenced by a tradition. More importantly, whether popping, voguing, twerking, or dancing Gangnam style, the point is not to be original in the sense of creating without copying—the point is to *participate*. It is through this process of participation that influence and inspiration culminate in ongoing creativity. Anthea Kraut suggests that the exclusion of “social dance steps” from U.S. copyright protection could be explained on the basis that “government officials have been disinclined to grant exclusive rights in participatory forms of dance that would give one individual the power to restrict the movements of others, effectively inhibiting participation.”⁶⁸ When choreographer Richard Silver recently asserted copyright

⁶⁶ See “Iggy Azalea Claims Miley Cyrus’ Twerking Was ‘Probably’ Inspired By Her Dance Moves”, Huffington Post, 03 October 2013, Available at: http://www.huffingtonpost.com/2013/10/03/iggy-azalea-miley-cyrus-twerking_n_4036595.html.

⁶⁷ See <http://En.m.wikipedia.org/wiki/Twerking>.

⁶⁸ Kraut, “*Stealing Steps*”, *supra* note 23 at 178.

in the Electric Slide, ostensibly to prevent it from being performed and posted online by people doing it “incorrectly,”⁶⁹ we got a glimpse of what this power to inhibit public participation could look like.⁷⁰ Such control over others’ interpretation of popular dance steps appears entirely antithetical in this context. If the above examples depict how creative practice typically evolves in the world of dance—through an ongoing process of reciprocal exchange between subcultures and pop culture—one wonders whether copyright’s grant of exclusivity, however limited, can be anything other than an obstacle to its development.

While the “culture of sharing”—or at least the inevitability of copying and competition—is not unique to choreographers as distinct from other creators, perhaps nowhere (with the possible exception of jazz and blues music)⁷¹ is it so fundamental to the practice and evolution of the art form as it is to dance. Simply put, the art of choreography—understood in its broad and non-exclusionary sense as the creation of dance—is necessarily embodied, social and interactive. Moreover, whereas popular success in the literary arena means that everyone is *reading* your book, in the world of choreography popular success means that everyone is *doing* your dance. This distinction is important for two reasons: first, when “doing” includes performing in public, it is an act that the copyright owner has the right to control; and second, the act of dancing or performing is itself a creative one that produces new (and potentially copyrightable) expression even as it reproduces old. In both regards, dancing is sufficiently unlike reading that we might wonder whether the copyright law and policy that developed in application to literary works can be appropriately transposed from the literary to the choreographic without being twisted (and indeed jerked) out of shape.

⁶⁹ See Daniel Terdiman, “The Copyright Buzz from the Electric Slide”, CNET news, 4 June 2007, available at: http://news.cnet.com/The-copyright-buzz-from-the-Electric-Slide/2100-1026_3-6188297.html

⁷⁰ See http://en.wikipedia.org/wiki/Electric_Slide. Under the terms of the Creative Commons license negotiated with Silver by the Electronic Frontier Foundation, noncommercial uses of the choreographic work are permitted with attribution to Silver. See also Kraut, “Stealing Steps”, *supra* note 23 at n. 19.

⁷¹ See, e.g., Kevin Green, “Copyright, Culture and Black Music: A Legacy of Unequal Protection” See also, Olufunmilayo Arewa, “From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context.” Case Legal Studies Research Paper No. 04-21; North Carolina Law Review, Vol. 84, p. 547, 2006. Available at SSRN: <http://ssrn.com/abstract=633241>; and J. Michael Keyes, “Musical Musings: The Case for Rethinking Music Copyright Protection” (2004) 10 Mich Telecomm & Tech L Rev 407;

V. AUTHORSHIP AND THE CHOREOGRAPHER/PERFORMER DICHOTOMY

The idea that the widespread practice of borrowing or even “stealing” moves has been, and continues to be, a vital part of the evolution of innovative dance styles and forms should not be surprising. Ideas of sole authorship clash with the physical and relational realities of the choreographic form. As I have suggested, dance is by nature inherently social primarily because it is developed, explored, and experienced through performance. The inherent connection between choreography and performance—which merge in the concept of “dance”—is therefore another site of strain in the application of traditional copyright doctrine.

Unlike the literary author, the idealized romantic author figure in the context of dance is not locked away in his garret, with great thoughts silently emerging onto paper. He is practicing movements, physically demonstrating ideas, directing and honing the actions of others, performing and perfecting for and before an audience. This is true even of the classical ballet choreographer—copyright’s ideal type⁷²—where the mythical figure of the genius creator has its greatest traction. In other modern, “reactionary” or more inclusive dance forms, this notion of independent authorship becomes only more tenuous. Caroline Picart emphasizes the importance of the choreographer as author-figure in the law’s construction of copyrightable choreography:

It is not surprising that intellectual property law, in general, tends to privilege ‘whitened’ dance forms, such as ballet, because there are clear choreographers who author the lines and movements using the bodies of dancers, who are as ‘raw material’ shaped/posed/‘created’ by choreographers.

The choreographer/performer binary thus posits the choreographer as the unique creative mind and the dancer as merely his material of choice: the dancer is to the choreographer as

⁷² See Caroline Joan S. Picart, *Critical Race Theory and Copyright in American Dance: Whiteness as Status Property* (New York: Palgrave Macmillan, 2013) [*American Dance*].

the clay is to the sculptor. As Picart goes on to state, however, “the legal binary is one difficult to sustain in the practice of designing/learning choreography, especially within the non-white traditions of jazz and tap.”⁷³ As we look beyond the context of classical ballet, the kind of creators who push dance in new directions are certainly not marking steps alone in their proverbial garret, or even in their studio; they are performing in dance clubs and improvising on downtown streets. These dancers are not merely reproducing the set movements or artistic vision of another’s mind; they are exploring their own physical limits and expressive capabilities through their own bodies and for others to see. As Picart’s critique underscores, the kind of “improvisation derived from ‘popular’ street dances that do not share the whitened aesthetic characteristic of more established dance forms, such as ballet, tends to become discredited as ‘not original.’”⁷⁴ In other words, the creators who come closest to copyright’s notion of the author, independently bringing forth his original vision through his “materials,” will be privileged as owners (notwithstanding that their creative process differs from the romantic author trope); the “others,” whose embodied creative processes depart more radically from this privileged aesthetic form, are more likely to see their creativity relegated to the status of non-original performance or public domain.

Rather than critically examining the racialized and gendered assumptions that are evidently at play in copyright’s hierarchy of choreographic creativity,⁷⁵ my modest aim here is problematize copyright’s choreographer/performer binary by exploring the creative relationship between choreographer and dancer. It should first be emphasized that choreography is so inextricably intertwined with performance not only because of the nature of dance, but also due to the requirements of copyright law. It is only upon fixation in a tangible form that copyright vests in a work. Given the difficulties associated with notating choreography and the rarity of notation as a routine practice amongst choreographers, fixation (and so protection) typically comes in the form of film or video-recording of a performance of a work. The difficulty is that, as Melanie Cook explains, “The

⁷³ Ibid. at 64.

⁷⁴ Ibid. at 64.

⁷⁵ For excellent discussion from this critical perspective, see generally, Picart, *American Dance*, *supra* note 72.

individual style of the dancer...intervenes between the pure movement that the choreographer created and the filmed version of the dance.”⁷⁶ In this context, extricating the choreographic work from the particular performance thereof is a conceptually challenging (and practically impossible) task; in the words of dance critic Sally Banes, “if most of the fixations take the form of videotape or film recording, it will be hard to detach the choreographic ‘text’ from its performance, the ‘dancer from the dance.’”⁷⁷

Should interpretative aspects of a fixed performance be protected as part of the choreographic work or excluded from protection? What if, as Julie Van Camp suggests, it is “almost impossible to identify which aspects are part of the choreographic work and which are the interpretive contributions of the performers?”⁷⁸ Copyright’s commitment to, and reliance upon, the material embodiment of choreography sits uneasily with the dynamic nature of dance. The reality is that the dance is fixed, to the extent that it can be, in the memories and through the bodies of the dancers,⁷⁹ while its performance is inherently fleeting and ephemeral. Or, in Balanchine’s words: “[B]allet is NOW. It’s about people who are NOW. ...Because as soon as you don’t have these bodies to work with, it’s already finished.”⁸⁰

We have considered, in the preceding section, the nature of choreography as a historically “collaborative, cumulative enterprise” in the sense that choreographers necessarily “build on the body of dance tradition that came before them.”⁸¹ Banes adds to this theme the idea that choreography is also collaborative and cumulative “at the time of its making,” in the sense that “choreographers usually make dances directly on their dancers’ bodies, so the dancers contribute to the creative process, sometimes to a very great extent, in both ballet

⁷⁶ Cook, “New Beat”, supra note 24 at 1296.

⁷⁷ Sally Banes, “Homage, Plagiarism, Allusion, Comment, Quotation: Negotiating Choreographic Appropriation” in Banes, *Before, Between, and Beyond: Three Decades of Dance Writing* (Madison, Wisconsin: The University of Wisconsin Press, 2007), 198-215 [“Appropriation”] at 201.

⁷⁸ Van Camp, supra note 15 at 68.

⁷⁹ Cp. Martha M. Traylor, “Choreography, Pantomime and the Copyright Revision Act of 1976”, 16 New Eng. L. Rev. 227 (1980-1981) at 235: “[T]he ‘setting’ into the memories and bodies of the dancers is just as tangible as the writing on paper which expresses the artistic ideas of an author, or the placing on canvas of a painter’s ideas.”

⁸⁰ George Balanchine, “Work in Progress” in *Dance as a Theatre Act* (Selma Jeanne Cohen, ed., 1974) at 192.

⁸¹ Ibid. at 204

and modern dance.”⁸² The interweaving of performance and text thus begins from the moment of creation. Martha Traylor described the process of traditional choreographic creation:

[It] is very different from an author writing words on paper. A choreographer works with a group of dancers who are trained in the discipline, and with a skeleton music source. The intellectual act of creation occurs when movements are conceived by the choreographer and directed into the trained bodied and intellects of the dancers. Only the thoughts and artistic cconcepts of the choreographer are manifested... The dancers’ role is to follow the directions of the choreographer.”⁸³

When we consider, however, the creative capacities of dancer regarded as performer, not putty, the picture of the creative process becomes more complex. Guillaume Côté, choreographer and principal dancer for Canada’s National Ballet confirms Traylor’s description when he explains that his creative process “didn’t happen at home, in front of my computer. It didn’t happen while I was listening to a Walkman. And it didn’t happen when I was in the studio dancing it myself. It happened when I was talking with the dancers.” But the role of the dancers, for Côté, was far more than following directions to express his ideas:

I usually have a very good idea, a good preconceived notion, of what I want to do when I choreograph. I walk into the room, and I’ve got the score in hand. And for this particular one, I also had all my steps planned out. And then it was the most wonderful thing to realize that working like that made no sense. It was a piece I had made for me. It was my movement. But then I got to the studio and there were the dancers.... They are the vessel for the piece. I told them what I wanted them to do and then they did it differently. And it was beautiful for being an accident. I couldn’t possibly let my ego, or what I had originally intended, be more important than going down the avenue where those beautiful accidents were happening. ... So it was a constant negotiation between what I thought I had...[in my head] and what I saw there.⁸⁴

⁸² Ibid.

⁸³ Martha M. Traylor, “Choreography, Pantomime and the Copyright Revision Act of 1976”, 16 New Eng. L. Rev. 227 (1980-1981) at 234.

⁸⁴ Guillaume Côté, quoted in Deirdre Kelley, “For Dancer Guillaume Côté, Creating Art is a Series of Beautiful Accidents”, *Globe & Mail*, 21 June 2013, available at: <http://www.theglobeandmail.com/life/the-catalysts/for-dancer-guillaume-cote-creating-art-is-a-series-of-beautiful-accidents/article12749857/?page=all>.

Professor Susan Leigh Foster describes the creative role of the dancer challenged with “translat[ing] choreography into performance.”⁸⁵ As part of this process they will “modify the movement so as to develop a personal relationship with it. In order to ‘make it their own,’ they may alter movement to adapt to their bodily capacities.”⁸⁶ Throughout the process of learning and presenting a dance, they may “refine stylistic features of their performance,” draw upon a “traditional style” and otherwise manifest the competencies developed over years of training.⁸⁷ But more than this, Foster explains, dancers may on occasion “move beyond the bounds of their training as performers and...assume roles as choreographers of the dance.” She describes how they may be asked to “generate movement” and to “solve problems of sequencing” or “select from among the representational strategies.”⁸⁸ Nonetheless, Foster maintains, “The fact that the dancers may assist in these choreographic projects...does not alter the distinctiveness of the two roles.... The contrasting functions of choreography and performance are apparent: dance making theorizes physicality, whereas dancing presents that theory of physicality.”⁸⁹

The difficulty, for copyright purposes, is that severing the ‘dance making’ from the dancing, or in Cook’s terms, the “pure movement” from the “interpretation,” is beyond the kind of substantive analysis that could or would typically be undertaken by a court of law in the context of copyright litigation. Ultimately, as Foster acknowledges, “there is a sense in which the performance of any given dance stands as the most accurate presentation of its choreography (*stands as the choreography*) insofar as any given viewer has access to it.”⁹⁰ Thus, in law, the fixation is the best evidence of the substance of the choreographic work, and it is the work thus embodied over which the choreographer may claim title to copyright. Moreover, the choreographer’s protected work extends beyond the

⁸⁵ Susan Leigh Foster, “Choreographies of Gender” in Philip Auslander (ed.), *Performance: Critical Concepts in Literary and Cultural Studies* (New York, NY: Routledge, 2003), 111- 140, at 118 [“Choreographies of Gender”].

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid. at 118-119. According to Banes, this “communal process of making dances,” which creates the sense of “family” in the dance world, likely has a bearing on the way in which the dance community views intellectual property structures and legal controls: resort to copyright law may be regarded as a violation of a “treasured system of shared trust and intimacy.” Banes, “*Appropriation*,” *supra* note 77 at 204-205.

⁹⁰ Ibid. at 119 (emphasis added).

particularities of the performance as fixed to include more abstract elements of the work, as well as the kind of variations that necessarily occur with each different performer and performance.⁹¹ As with dramatic works, the fixed version is merely a stable, hypostatized representation of a work that is, by its nature, fluid and indeterminate. The choreography might thus be said to “stand[] apart from any performance of it as the overarching score or plan... This plan...is what endures as that which is augmented, enriched, or repressed in any given performance.”⁹² That being said, where it is “augmented” or “enriched” by the dancer’s added expressive elements, these elements cannot be said to originate with the choreographer; from a strict doctrinal perspective, then, and subject to the obvious evidentiary challenges, the dancer’s original expressive contributions ought not to fall within the scope of the choreographer’s claim to right.

What, then, can be said about the contributions of the performer as contributor and occasional co-choreographer? To what extent and under what circumstances might these contributions elevate the performer to the status of author-owner, and in Canada, elevate the performer’s neighbouring right to copyright in the choreography *per se*? A court is likely to look for evidence of who contributed exactly what and at the behest of whom in order to determine legal authorship and ownership. As the law attempts to parse and individualize these contributions, however, it necessarily distorts the creative process through which they were assembled. Perhaps, as Van Camp acknowledged, it might be argued that the dancers and the choreographer should be considered joint authors.⁹³ Such a determination requires a finding of independently copyrightable contributions by the choreographer and dancer that are nevertheless interdependent (or, in Canada, not distinct) parts of the unitary whole.⁹⁴ It is plausible that, in many cases, works formed

⁹¹ In the context of dramatic works, courts have emphasized the need for some degree of stability and unity, such that the work is identifiable and capable of re-performance in spite of inevitable variations. See, e.g. *Kantel v. Grant* [1933] Ex. C.R. 84; compare *Green v. Broadcasting Corp. of New Zealand* [1989] R.P.C. 469. The legislative intent to accommodate variation is implicit in the definition of “dramatic work” (including “choreographic work”) which requires only that “the scenic arrangement of acting form of which is fixed in writing or otherwise.”

⁹² *Ibid.* at 124.

⁹³ Van Camp, “*Choreographic Works*”, *supra* note 15 at 68.

⁹⁴ The U.S. Copyright Act 1976 defines “joint work” as “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.” 17

through the dialogue and exchange between choreographer and dancer, as described by Côté, will indeed satisfy these requirements. In the United States and in Canada, however, joint authorship has been held to require, in addition to a copyrightable contribution, a mutual intent to be joint authors;⁹⁵ it is here that the authorship claims of dancers are likely to falter in the face of convention, and the expectations and egos of choreographers.

The above discussion considers situations in which, however intertwined the contributions, the choreographer and the performer are not one and the same. Consider now how complex the line between choreographic work and performance becomes when the performer *is* the choreographer, the author of the dance “text,” particularly through free-style, improvised (but, for copyright purposes, simultaneously recorded) performance. It may be that the distinction remains valid. As Foster explains, “Although [break]dancers occupied the dual roles of choreographer and performer, the responsibilities and evaluative standards of each role can be distinguished.”⁹⁶ Simply put, choreography is evaluated for its substantive characteristics, while performance evaluation is based on more stylistic attributes. Interesting from a copyright perspective is the need to pull apart and disentangle not simply the different types of contributions of two or more people, but the contributions of different types made by a single individual. In some sense, the practical impossibility of the latter task hints at the folly of the former.

For copyright scholars, this scenario will be reminiscent of a similar doctrinal quandary in the music context. In the case of *Newton v. Diamond*,⁹⁷ the US Court of Appeals for the Ninth Circuit distinguished between the copyright of a musician in his composition (as scored musical notation) and the performance (as played by the composer and recorded). The

U.S. Code §101. Canada’s Copyright Act 1985 defines a “work of joint authorship” as “a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.”

⁹⁵ *Childress v. Taylor*, 845 F. 2d 500 (2d Cir. 1991); *Aalmuhammed v. Lee*, 202 F. 3d 1227 (9th Cir. 2000); *Neudorf v. Netzwerk Productions Ltd.* (1999), 3 C.P.R. (4th) 129 (B.C.S.C.); but *see also*, *Neugebauer v. Labieniec*, 2009 FC 666 (F.C.).

⁹⁶ Foster, “Choreographies of Gender” at 123. Foster’s explains: “Choreography was evaluated in terms of the range and vividness of citations; the innovative sequencing; the responsiveness to music, crowd, and context; and the deftness with which the body from extricated from unanticipated situations. Performance evaluation was based on the charisma, cool, funkiness, virtuosity, and audacity that dancers exhibited while thinking on their feet.”

⁹⁷ 388 F. 3d 1189.

sound recording of the performance was a material embodiment of the musical composition, just as a video-recording of a performance is a material embodiment of a choreographic work. Plaintiff's expert testified that "the contribution of the performer is often so great that s/he in fact provides as much musical content as the composer."⁹⁸ It was held, however, that, in his capacity as composer as opposed to performer, James Newton's copyright in the musical work did not extend to the sounds as distinctively performed by him and fixed in the recording.⁹⁹ By analogy, this may suggest that contributions distinctive of the dancer as performer are to be stripped from his or her underlying choreographic work and left to the preserve of neighbouring rights or simply the public domain.

Before leaving this discussion, it is worth noting that, in the case of the free-style dancer/choreographer, another challenge for copyright doctrine is the perceived need to distinguish between what is stable, pre-planned, and reproducible (the text) and what is spontaneous, unplanned, and unpredictable (the action). Spontaneous or extemporaneous creations are often excluded from the domain of copyright on the basis that they do not constitute "works." The prime example being spontaneous utterances, which, even if recorded, are typically refused protection as literary expression.¹⁰⁰ Courts have relied upon the same distinction in the effort to differentiate the unprotectable physical moves and sequences of athletes from and the copyrightable movements of dancers:

Even though sports teams may seek to follow the plays as planned by their coaches, as actors follow a script... in the end what transpires on the field is usually not what is planned, but something that is totally unpredictable. ...No one can forecast what will happen. This is not the same as ballet, where, barring an unforeseen accident, what is performed is exactly what is planned. No one bets on the outcome of a performance of Swan Lake. Ballet is, therefore, copyrightable, but team sports events, despite the high degree of planning now involved in them, are not.¹⁰¹

⁹⁸ Ibid. at 1194.

⁹⁹ The court reasons: "performance elements are beyond consideration in Newton's claim for infringement of his copyright in the underlying composition," and proceeded to assess the claim in respect of the "composition, devoid of the unique performance elements found only in the...recording." Ibid. at 1195.

¹⁰⁰ See, e.g. *Gould Estate v. Stoddart Publishing Co.* (1988), 39 O.R. (3d) 545 (Ont. C. A.); citing *Falwell v. Penthouse International Ltd.*, 215 U.S.P.Q. 975 (U.S. W.D. Va. 1981) at 977.

¹⁰¹ *FWS Joint Sports Claimants v. Canada Copyright Board*, 36 C.P.R. (3d) 483 (Fed. C.A.), leave to appeal to S.C.C. refused (1992), 88 D.L.R. (4th) vi (note)(S.C.C.).

Team sports events may well be distinguishable on this basis, but to attribute non-copyrightability to unpredictability is potentially to exclude a vast array of creative endeavours that are improvisational in nature. The Canadian Court of Appeal's reasoning can explain why a traditional ballet is protected; but it could also be used to exclude the improvised, free-style moves of the jazz, break or hip hop dancer, even when fixed through filming. Foster describes how, "Like jazz, break dancing required the choreographer-performer to draw on previously choreographed and rehearsed phrases and to sequence these along with newly invented material in ways that yielded unpremeditated results."¹⁰²

A preferable basis on which to exclude sporting moves from the realm of copyrightable choreography may be an overtly policy-driven one such as that articulated by the US Second Circuit in *Nat'l Basketball Ass'n v. Motorola, Inc.*: "Even where athletic preparation most resembles authorship—figure skating, gymnastics, and...professional wrestling—a performer who conceives and executes a particularly graceful and difficult...acrobatic feat cannot copyright it without impairing the underlying competition in the future."¹⁰³ As we have seen, however, dance often and increasingly takes the form of competition, particularly as it moves from the theatres to the clubs and streets, where "dance battles" elevate "the competitive stakes of each [consecutive solo] performance allow[ing] dancers to enhance their status and increase their prestige."¹⁰⁴ Even the current success of dance competition television shows like *So You Think You Can Dance*, *Dancing with the Stars*, and *Dance Moms*, starkly reveals the competitive nature of dance in many of its modern and participatory forms and forums. Meanwhile, the increasing emphasis on aesthetic accomplishments within competitive sports such as snowboarding and skiing,¹⁰⁵ further underscores the elusiveness of this distinction between dance choreography and athletic competition. Once again, the absence of any elements of underlying competition might explain why a conventional ballet is protected as a choreographic work; but it risks excluding many more overtly competitive forms of dance that depart from this traditional aesthetic.

¹⁰² Foster, "Choreographies of Gender" *supra* note 85 at 123.

¹⁰³ 105 F.3d 841 (2d Cir. 1997) at 846.

¹⁰⁴ Foster, "Choreographies of Gender" *supra* note 85 at 122.

¹⁰⁵ See Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L & ARTS 317 (2000) at 322.

In summary, then, it might be said that copyright's conception of the choreographer relies upon the false binaries of choreographer/performer and choreographic work/performance. In doing so, it denies the relational and dialogic processes of choreographic creativity, and misrepresents the choreographic work as predictable and stable over time and across bodies. In its effort to portray dance as a "work", it reduces dance to the merely aesthetic, stripping it of its social, collaborative, and competitive qualities. What the above discussion reveals, I hope, is the inherent difficulty of distinguishing between the choreographer and the dancer, of severing the work from its performance, and of distinguishing the choreographic work from other forms of practiced physical performance. My implication, of course, is that these conceptual challenges illuminate the poverty of the legal constructs we employ in order to understand—and appropriate—the processes and products of human creativity in the world of dance, and beyond.

VI. CONCLUDING THOUGHTS

There are many characteristics of dance that we can point to in support of the claim that "dance ...is different!"¹⁰⁶ Over the course of this discussion, I have emphasized that dance is dynamic; that it is fleeting; that it is grounded in tradition and constrained by style; that it is created and experienced through live performance; that it is shared through physical repetition and competition; that it is developed through physical and creative collaboration; that it is fixed through bodies rather than on paper; that it is unpredictable and undefinable. In many of these respects, and others, it may rightly be said that one characteristic or another is shared with this category of work or that creative activity. My suggestion, however, is that choreography combines, in one expressive form, perhaps all of the features of human creativity that can make it so hard to confine and control through copyright's proprietary structures. Choreography therefore offers a rich landscape within which to explore the contours of copyright law, and to challenge its constructions of the author, authorship, and the work.

¹⁰⁶ Wallis, *supra* note 36 at 1445.

In addition to a conceptual critique, however, choreography merits more careful examination from a policy perspective. Sally Banes warned, in 1998, that with the rapid evolution and accessibility of recording and broadcast technologies, “choreographers are only now being faced with the challenges regarding reproduction and the distribution that have been discussed at length in the courts regarding the music industry, for example, since 1909.” Banes concluded: “it seems clear that conditions in the culture generally and in the dance world in particular will lead to more litigation and the use of other legal avenues of control.... Whether this is for good or for ill, only time will tell.” Banes was not wrong to imagine that conditions were ripe for copyright to take root within the choreography community as it had in the world of music—and she was wise to regard this as cause for concern. However, in the fifteen years that have followed, there is no indication of an explosion of registrations, litigation, or copyright complaints in relation to choreographic works. Rather, the dance community continues to eschew the copyright regime in favour of established customs. There may be many reasons for this apparent antipathy toward copyright law,¹⁰⁷ but for now it is the results that bear emphasis: dance remains one of the few realms of creative practice in our society where copyright norms appear not to have had a pervasive impact.

When Sally Banes expressed her concern about the encroachment of intellectual property structures, she noted: “the outlaw musical sampling once favored by contemporary hip-hop artists is only the latest instance of a long tradition of artistic borrowing that has served to enrich the various arts while simultaneously raising anxieties about proprietary rights.”¹⁰⁸ It is no secret that copyright law has constrained and suppressed sampling practices in the realm of hip hop music in a way that has been, in the view of many, detrimental to that genre’s development.¹⁰⁹ Contrast this with hip hop dance, where homage, allusion and

¹⁰⁷ See Banes, *supra* note 50 at 203-207; see also, Kovac, *supra* note 14 at 147-8.

¹⁰⁸ Banes, *supra* note 50 at 209.

¹⁰⁹ See, e.g. Kembrew McLeod and Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Duke University Press, 2011). See also, Olufunmilayo B. Arewa, “From J.C. Back to Hip Hop: Musical Borrowing, Copyright and Cultural Context”, 84.2 North Carolina L. Rev. 547-645 (2006).

quotation continue to thrive unabated, as they did amongst the first break-dancers of 1970s urban America:

Into this flow [of motion], dancers incorporated...citations of other dancers' characteristic movements and of other dance traditions. These citations functioned as dialogues, as playful and competitive mastery of other dancers' material, and as expressions of solidarity with earlier Afro-American and African dance traditions. In their borrowings from forms such as karate and Capoeira, they also placed break dancing on the world stage of popular culture. The power and eloquence of the dance resulted from...the critical and witty commentary on other bodies and dance forms. ...Dancers signaled communal affiliations...through the danced dialogues they chose to incorporate.¹¹⁰

Perhaps, then, it is in the dance styles and communities where choreography least resembles the authorial trope of independent origination, that we can see most clearly what collaborative, cumulative creativity looks like—participatory, dialogic, and unimpeded by legal copyright constructs that apply neither in practice nor in principle.¹¹¹

¹¹⁰ Foster, *supra* note 85 at 122-123.

¹¹¹ So please don't stop practicing your Gangnam Style horse-riding dance in public!