NOTES

Square Dance: Fitting the Square Peg of Fixation into the Round Hole of Choreographic Works

I. UNWANTED SOLO: MOVING CHOREOGRAPHIC WORKS INTO STEP WITH COPYRIGHT

If all the arts are brothers,[1] dance is the forgotten stepchild of the family. The "black sheep"[2] of the arts, dance has struggled to find academic and legal recognition on par with its creative counterparts. Throughout the history of U.S. copyright protection, dance has consistently been an afterthought. Although Congress passed the first copyright law in 1790,[3] copyright did not explicitly protect choreographic works until 1976.[4] The 1909 Copyright Act only protected pieces of choreography that could be registered by the author as a type of "dramatic composition."[5] This relegation to a subset-of-a-subset aptly characterizes the ongoing academic and artistic search for an ontology[6] of dance separate from other, more established art forms such as music or theater. The academic study of dance remains "a relatively new (and chronically underfunded) field of educational study and research."[7]

Dancers and choreographers consistently feel frustration with the state of the copyright laws in the United States,[8] while lawyers chafe against the perceived lack of effort choreographers make to conform their work to the statutory requirements. Only those choreographic works that are "fixed" may be copyrighted[9]: demanding

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1. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 197 (1999) (quoting the Abbé Grégoire).

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

3. Benjamin W. Rudd, *Notable Dates in American Copyright 1783–1969*, 28 Q.J. LIBR. CONGRESS 137, 138 (1971), *available at* http://www.copyright.gov/history/dates.pdf.

4. Copyright Act of 1976, Pub. L. No. 94-553, § 102(a)(4), 90 Stat. 2541, 2545 (codified at 17 U.S.C. § 102(a)(4) (2006)).

5. 1909 Copyright Act, Pub. L. No. 60-349, § 5(d), 35 Stat. 1075, 1076, *superseded by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (current version at 17 U.S.C. § 102 (2006)) [hereinafter 1909 Act].

6. *See infra* note 73 and accompanying text.

7. DANCE HERITAGE COALITION, STATEMENT OF BEST PRACTICES IN FAIR USE OF DANCE-RELATED MATERIALS: RECOMMENDATIONS FOR LIBRARIANS, ARCHIVISTS, CURATORS, AND OTHER COLLECTIONS STAFF 4 (2009), *available at* http://www.danceheritage.org/DHC_fair_use_statement.pdf.

8. *See generally infra* Part III (noting the tension between the goal of protecting creative works and the practical need of choreographers and dancers to build upon certain basic steps, as well as the works of others).

9. 17 U.S.C. § 102(a) (2006); *see also* U.S. COPYRIGHT OFFICE, CIRCULAR 1: COPYRIGHT BASICS 3 (2011) [hereinafter COPYRIGHT OFFICE, CIRCULAR 1], *available at* http://www.copyright.gov/circs/circ01.pdf (stating that copyright does not protect "works that have not been fixed in a

either a video recording, which glosses over much of a work's nuance,[10] or a specially notated version of the choreography, often costing more than the work is able to generate.[11]

In recent years, the importance of copyright protection for choreographic works has skyrocketed for both artistic and commercial reasons. Dance's emergence as an art form that demands increasing recognition based upon its own artistic merit has substantial implications for its legal protection. Throughout the twentieth century, choreographers created works that pushed the boundaries of established conceptions of movement. Their works played an integral role in the crafting of social consciousness at many pivotal moments in American history.[12] These pioneers of the modern dance movement are aging rapidly: a few have died in the last decade[13] and many are in advanced age and declining health. Some of the works created by these choreographers are financially significant, and almost all contain artistic significance that will breed litigation over their performance rights and the economic consequences that follow.

Commercial exploitation of choreographic works has increased exponentially as dance grabs a place in American pop culture.[14] Television shows such as *Dancing with the Stars* and *So You Think*

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tangible form of expression (for example, choreographic works that have not been notated or recorded . . . .)").

10. Another traditional argument against video recording is that the two-dimensional nature of the recording results in an incomplete record of the work. With the rise of three-dimensional television, it is possible that video recording will become a more widely appreciated method of fixation. These technological advances will only add to the continuing viability of the fixation requirement.

11. *See, e.g.*, Singer, *supra* note 2, at 291 ("[B]ecause paying audiences are small, while production costs are high, most choreographers and dancers are seriously underpaid.").

12. Concerts given at Judson Memorial Church beginning in 1962 made the church synonymous with art that pushed the boundaries, moving dance from structured storylines and balletic steps to movements that encapsulated the more average human condition. It was a collaboration between dance and other social progressions: the church housed the first drug treatment facility in Greenwich Village, operated an abortion clinic prior to *Roe v. Wade*, and provided interracial, international housing well before it was socially acceptable to do so. *See History: Overview*, JUDSON MEMORIAL CHURCH, http://www.judson.org/History (last visited Mar. 13, 2012).

13. Martha Graham and Merce Cunningham are two of the most significant losses. *See* Anna Kisselgoff, *Martha Graham Dies at 96; A Revolutionary in Dance*, N.Y. TIMES, Apr. 2, 1991, http://www.nytimes.com/learning/general/onthisday/bday/0511.html (announcing Graham's death and setting forth her accomplishments); Alastair Macaulay, *Merce Cunningham, Dance Visionary, Dies*, N.Y. TIMES, July 27, 2009, http://www.nytimes.com/2009/07/28/arts/dance/28cunningham.html (announcing Cunningham's death and setting forth his accomplishments).

14. *See* Joi Michelle Lakes, Note, *A Pas de Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1829 (2005) (stating that many of America's most memorable cultural icons—including Fred Astaire, Ginger Rogers, and Madonna—have been dancers).

You Can Dance skyrocketed dance into the realm of primetime audiences and hit reality television shows.[15] The Emmy Awards recently began recognizing achievements in outstanding choreography.[16] Media industry titans Walt Disney, Inc. and Twentieth Century Fox already hold production rights in dance shows.[17] In combination with the like-titled song, Beyoncé's *Single Ladies* dance took the Internet, dance studios, and popular culture by storm and spawned numerous takeoffs, each of which utilized not just the music and lyrics, but the choreography as well.[18] As corporate interest in dance as a moneymaking enterprise continues to grow, it will become more important to develop a clearly defined system for establishing legal rights and ownership in choreographic works.

The definition of the ontology of dance has shifted distinctly in the forty-five years since the 1976 Copyright Act passed, and the issue of copyright protection for choreographic work is ripe for review. This Note provides a theoretical justification for retaining the statutory fixation requirement for choreographic works while demonstrating how this seemingly limiting prerequisite honors the customs and goals of the art form and effectively promotes natural rights in a way that

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15. *See 'Dancing with the Stars' Finale Gets Huge Ratings*, HUFFINGTON POST (Nov. 24, 2010, 12:58 PM), http://www.huffingtonpost.com/2010/11/24/dancing-with-the-stars-fi_1_n_788177.html (recounting the ratings from the fall 2010 finale, which drew twenty-six million viewers); SO YOU THINK YOU CAN DANCE, www.fox.com/dance (last visited Mar. 13, 2012) (branching out from a dance show to a tour and foundation). MTV also embraced the dance trend, focusing on street dancing with its show *America's Best Dance Crew*, which was renewed for a sixth season in November 2010. Robert Seidman, *MTV Renews 'America's Best Dance Crew' for Sixth Season; Premieres in April 2011*, TV BY THE NUMBERS (Nov. 22, 2010), http://tvbythenumbers.zap2it.com/2010/11/22/mtv-renews-americas-best-dance-crew-for-sixth-season-premieres-in-april-2011/73040.

16. *2010 Emmy Nominations: Outstanding Choreography*, EMMYS, http://www.emmys.com/nominations?tid=108 (search "2010" for "year" and search "choreography" for "category"). Four choreographic works from *So You Think You Can Dance* and *Dancing with the Stars* were nominated in 2010. *Id.*

17. The aforementioned *Dancing with the Stars* (ABC) and *So You Think You Can Dance* (Fox) are owned by The Walt Disney Company and News Corporation (the parent company of Fox), respectively. See *Company Overview,* WALT DISNEY COMPANY, http://corporate.disney.go.com/corporate/overview.html (last visited Mar. 13, 2012); *Who Owns What*, COLUMBIA JOURNALISM REV. (July 27, 2011), http://www.cjr.org/resources/?c=newscorp.

18. It is worth noting that this choreography bears a striking similarity to the work of prominent twentieth century choreographer Bob Fosse, specifically his work "Mexican Breakfast." A brief visual comparison reveals the similarities, but more significantly, Beyoncé herself gave multiple interviews acknowledging that she drew heavily on inspiration from Fosse. *See Beyonce Confirmed That Single Ladies Video Was Indeed Inspired by Broadway Choreographer Bob Fosse*, YOUTUBE (Nov. 18, 2008), http://www.youtube.com/watch?v=e-SlfHHd3qI.

many critics feel is missing from American copyright law.[19] Although choreographers bemoan the fact that recorded or notated versions of choreographic works do not effectively capture the "soul" of the work and are therefore inherently unsatisfying, the fixation requirement is necessary to avoid inappropriate constraints on a natural right.[20] Part II provides a general history of copyright and dance. Part III analyzes the theoretical and practical reasons for the fixation requirement by drawing parallels to recent sports cases to demonstrate the significant link between access to movement and the progress of the art form. Part III then discusses the traditional acceptance of "stealing steps" and positions fixation as a desirable mechanism for respecting the culture and practices of the art form. Part IV expands on the need to retain the fixation requirement for choreographic works established in Part III and showcases how this requirement furthers the interests of both choreographers and the public.

II. REHEARSAL: HOW CHOREOGRAPHIC WORKS GAINED THEIR PLACE WITHIN COPYRIGHT LAW

It is important to analyze the effectiveness of the current copyright regime in light of the history of copyright treatment of dance. Dancers mature artistically through a culture that, while encouraging of innovation, relies on codification of training and a consciously self-referential bent to craft the raw materials necessary for the art form. This Part first gives a brief overview of the evolution of American copyright law and its goals and then addresses why copyright protection is necessary for choreographic works. It concludes by outlining the deficiencies of the currently available protection.

19. *See* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 4–5 (1985) (arguing for strong protections for artists' moral rights and summarizing the problems that arise from failing to recognize these interests). *See generally* Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 56–57 (1998) (urging protection for moral rights because of the significant societal role of artistic endeavors).

20. I use the term "natural right" to describe the Lockean idea of those rights which man receives from nature (or God) and which inhere in all mankind. *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 289 (Peter Laslett ed., 1988). Here, I specifically mean the ability of humans to manipulate their bodies in all movements that they can physically achieve.

A. Learning the Fundamentals: Building a Repertoire of Copyright Law

Like so many facets of American law, U.S. copyright law has a decidedly British lineage.[21] America's first copyright act closely followed the British Statute of Anne, a law promulgated primarily to regulate trade in the written word.[22] The Framers of the Constitution recognized the importance of protecting intellectual creations, inserting a clause that gave Congress the right "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[23] The so-called "intellectual property clause" animated congressional concern for copyright protection.

From its earliest conception, American copyright law has been driven by theories of economic utilitarianism.[24] This economic motivation traces to English ideas about the role of copyright. The Statute of Anne granted exclusive printing rights to authors of new literary works "for the Encouragement of Learned Men to Compose and Write,"[25] in order to provide an economic incentive for authors to combat a market monopoly that the British government viewed as harmful.[26] Likewise, its American progeny embodies "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors."[27] In 1945, noted American judicial scholar Zechariah Chafee, Jr.

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21. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3 (1968).

22. *Id.* at 14.

23. U.S. CONST. art. I, § 8, cl. 8.

24. *See, e.g.*, Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. (forthcoming 2012), *available at* http://www.law.stanford.edu/display/images/dynamic/events_media/Expressive_Incentives_in_Intellectual_Property.pdf ("Utilitarianism aligns fluently with (and is frequently justified in strong part by) the U.S. Constitution's grant of power to Congress '[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' "); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' ").

25. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.), *available at* http://www.copyrighthistory.com/anne.html.

26. *See* PATTERSON, *supra* note 21, at 143 ("It [the Statute of Anne] was a trade-regulation statute enacted to bring order to the chaos . . . and to prevent a continuation of the booksellers' monopoly.").

27. *Mazer*, 347 U.S. at 219.

expounded the underlying rationale of copyright, explaining: "We do not expect that much of the . . . art which we desire can be produced by men who possess independent means or who derive their living from other occupations . . . . [s]o we resort to a monopoly."[28]

The monopoly Chafee described is a limited monopoly for a limited time.[29] Congress granted property rights to creators of original works of authorship fixed in any tangible medium of expression for the life of the author plus seventy years.[30] The 1976 Copyright Act protects original works of authorship including the categories of: (1) literary works, (2) musical works, (3) dramatic works, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architectural works.[31] However, Congress recognized the limitations that would result if authors could copyright the "building blocks" of their works—no work is created in a vacuum, and if monopolies eat up all available ideas, innovation quickly disappears. For this reason, the law excludes ideas, processes, facts, concepts, and like categories from copyright protection.[32] Section 102 of the 1976 Act expressly states that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[33] This is the most significant limitation to copyright protection.[34] As this Note addresses in Part IV, the same principle that protects facts from monopolization supports maintaining the fixation requirement in the case of choreographic works.

The inability to assert ownership over facts or ideas limits all authors in an evenhanded way. However, the equity of this restriction is not illustrative of all aspects of copyright law. In the case of choreographic works, the fixation requirement proves to be a second,

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28. Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 507 (1945).

29. U.S. CONST. art. I, § 8, cl. 8.

30. 17 U.S.C. § 302(a) (2006).

31. *Id.* § 102(a).

32. *Id.* § 102(b).

33. *Id.*; *see also* COPYRIGHT OFFICE, CIRCULAR 1, *supra* note 9, at 3 (explaining that copyright protection does not extend to mere listings of ingredients or contents, ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, and other works consisting entirely of information that is common property).

34. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991) (stating that it is a settled principle of law that facts are not copyrightable).

significant limitation.[35] Section 101 of the 1976 Act specifies that a work is fixed in a tangible medium of expression when "its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[36] It is worth noting at this point that many—if not most—countries have no comparable fixation formality.[37] One of the major international intellectual property agreements,[38] the Berne Convention ("Berne"), forbids the precluding of copyright protection on the basis of formalities (for example, whether an author has published a work).[39] However, fixation does not fit within this ban: Berne explicitly states that "[i]t shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."[40] The United States has chosen to maintain a fixation requirement for a variety of reasons, many actually beneficial to authors of choreographic works.

Although the United States' retention of a fixation requirement remains fairly unique within the international community, it is not an arbitrary construction. The (at least) semipermanence necessitated by the fixation requirement is the congressional answer to the constitutional requirement that a limited exclusionary right be granted for "writings."[41] Traditionally, courts have felt that the choice of the word "writings" connoted something tangible and capable of reproduction.[42] Contrary to fixation's popular characterization—

35. Singer, *supra* note 2, at 301.

36. 17 U.S.C. § 101.

37. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 47 (3d ed. 2010).

38. The World Intellectual Property Organization ("WIPO") Copyright Treaty and the TRIPS Agreement are also important documents in the field of international copyright protection. *Id.*

39. *See* Berne Convention for Protection of Literary and Artistic Works art. 5, Sept. 9, 1886 (as amended Sept. 28, 1979) [hereinafter Berne Convention], *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P19_78 ("The enjoyment and the exercise of these rights shall not be subject to any formality. . . .").

40. *Id.* at art. 2.

41. U.S. CONST. art. I, § 8, cl. 8.

42. *See* United States v. Moghadam, 175 F.3d 1269, 1273 (11th Cir. 1999) ("The concept of fixation suggests that works are not copyrightable unless reduced to some tangible form. If the word 'writings' is to be given any meaning whatsoever, it must, at the very least, denote some material form, capable of identification and having a more or less permanent endurance."); *see also* Goldstein v. California, 412 U.S. 546, 561 (1973) (" '[W]ritings' . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.").

especially in dance circles—as an arbitrarily imposed construction, legislative history reveals that the fixation requirement emerged in reaction to a perceived failure by the courts to protect authors' rights.[43] In *White-Smith Publishing Co. v. Apollo Co.*, the Supreme Court held that a player-piano roll was not a copy because the music was reproduced by a machine rather than a human.[44] The Court's inflexible approach caused Congress to worry that technological advances would erode copyright protection.[45] In response, Congress inserted language in section 102, requiring fixation and allowing it to take any workable form, even if that form was unknown in 1976.[46]

The addition of the fixation requirement was not the only change Congress made in 1976. Prior to passage of the 1976 Copyright Act, choreographic works did not qualify for protection on their own merit, but rather only fit into the statutory regime if they could be characterized as "dramatic" works.[47] This lack of specificity invited judicial determination of artistic merit—judges could decline to extend protection if they merely didn't like the dance—which became increasingly untenable as dance gained recognition in the United States throughout the twentieth century. The more widely accepted an art form, the more likely it becomes that arbitrary decisions that decline to follow the copyright law's stated agnosticism toward artistic value will draw ire from those parties with a creative and/or economic interest at stake.

B. Immoral, Nondramatic, Unprotected: Dance Prior to the 1976 Act

Movement is universally human: unlike languages, where translational difficulties create significant barriers between peoples, movement is intelligible across social and cultural backgrounds. In the same way that the academic community has struggled to identify dance's place vis-à-vis the other performing arts, the judiciary has been unable to avoid passing value judgments in cases involving choreographic works. Although copyright protection nominally does not depend on the artistic merit of the work, the unsettled place of choreographic works within the copyright laws allowed judicial

43. H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.
44. 209 U.S. 1, 17 (1908).
45. H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665.
46. 17 U.S.C. §102(a) (2006).
47. 1909 Act §5(d).

overreaching through rulings based on aesthetic and/or moral value judgments.

In 1867, the California circuit court declined to protect a piece of choreography as a "dramatic . . . composition[ ]"[48] because it felt the ballet consisted primarily of "women lying around loose," and "[t]o call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama."[49] The court justified the ruling by opining, "[I]t is the duty of all courts to uphold public virtue, and discourage and repel whatever tends to impair it."[50] Ironically, the ballet "The Black Crook" was later credited for helping to revive American interest in ballet, typically considered a rather staid art form.[51]

In the late 1800s, choreography was particularly susceptible to dismissal based on subjective quality determinations. This is, perhaps, not surprising given the intimate connection between movement and human sexuality. When defining dramatic dance, a New York court held that movements designed to convey "no other idea than that a comely woman is illustrating the poetry of motion" were not within the statutory definition of "dramatic composition."[52] Circular 51,[53] issued by the Copyright Office to provide general information about copyright protection in choreographic works under the 1909 Copyright Act, defined choreographic work as "a ballet or similar theatrical work which tells a story[,] develops a character, or expresses a theme or emotion by means of specific dance movements and physical actions."[54]

Lack of statutorily enumerated protection for choreographic works gave judges substantial room to work outside of the statutory scope of "literary" or "dramatic" works. This wiggle room conflicts with Justice Holmes's admonition against judicial value judgments set

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48. *Id.*

49. Martinetti v. Maguire, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9173).

50. *Id.*

51. PEGGY VAN PRAAGH & PETER BRINSON, THE CHOREOGRAPHIC ART: AN OUTLINE OF ITS PRINCIPLES AND CRAFT 94 (1963).

52. Fuller v. Bemis, 50 F. 926, 929 (C.C.S.D.N.Y. 1892).

53. The Copyright Office routinely issues circulars and factsheets to provide general information about various aspects of U.S. copyright law. It is worth noting that Circular 51 is no longer included on the Copyright Office website. *See Information Circulars and Factsheets*, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/circs/ (last visited Mar. 12, 2012).

54. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS 96 (Comm. Print 1961) (authored by Borge Varmer) [hereinafter Study 28], *available at* http://www.copyright.gov/history/studies/study28.pdf. Circular 51 went on to reiterate that "[t]he dance must convey a dramatic concept or idea." *Id.*

forth in the canonical copyright case *Bleistein v. Donaldson Lithographic Co.*: "If [artistic works] command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and education value—and the taste of any public is not to be treated with contempt."[55] If the courts had held true to Holmes's admonition, the discounting of artistic merit based on subjective moral judgment might have been avoided.

When choreographers were successful in their pursuit of protection, it was often because they took the extra step of modifying the choreography into another form. For example, in 1953, choreographer Ruth Page copyrighted her *Beethoven Sonata* as a literary work by writing a book of detailed instructions for the work.[56] Page was the first choreographer to choose this route, compelled by judicial exclusion of nondramatic ballets under the 1909 Act.[57] Page's success was a hollow victory, however, as the Copyright Office warned her that it expressed no opinion as to whether unauthorized performance of the choreography would constitute infringement of the book.[58]

Conversely, at least one judge was swayed by a work's success and granted copyright protection without any concrete connection between the work and a dramatic composition. Although Hanya Holm's choreography from the musical *Kiss Me Kate* does not tell a story within its choreography, it received protection as a "dramatic work," likely due to a combination of the musical's story and the show's financial success.[59] Contemporaneous observers attributed this decision to the increased recognition of Labanotation[60] as a viable

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55. *See* Bleistein v. Donaldson Lithographic Co., 188 U.S. 239, 251–52 (1903) (chastising judges not to insert their own artistic preferences for the boundaries of the law: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

56. *See* Anatole Chujoy, *New Try Made to Copyright Choreography*, DANCE NEWS, Feb. 1953, at 4.

57. 1909 Act §5(d).

58. Lakes, *supra* note 14, at n.51.

59. *See* Leon Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 810–11 (1952) (positing that the Copyright Office may have been familiar with the dances from seeing or remembering the dances performed).

60. Labanotation is the most well-respected method of notating dance. It requires significant training to decipher, but if trained, a reader can extrapolate from a single symbol on a staff: (i) the direction of the movement, (ii) the part of the body doing the movement, (iii) the level of the movement, and (iv) the length of time it takes to do the movement. *Labanotation Basics*, DANCE NOTATION BUREAU, http://www.dancenotation.org/lnbasics/frame0.html (last visited Mar. 12, 2012). In addition to the cost and perceived imperfection of the methods of fixing choreography, it has been suggested that choreographers worried that fixation would decrease

notation format and Holm's willingness to spend the time and money notating her work.[61] However, it seems that there may have been more subjective judgments at play in Holm's case given that other musical choreographers were not as lucky.

Agnes de Mille created some of the seminal musical ballets. Her dream ballet sequence from *Oklahoma!* is one of the pivotal moments of the show and has been reproduced countless times in various versions, including successful main stage revivals that poured royalties into the pockets of the show's creators.[62] Yet, de Mille did not reap the economic incentives ostensibly provided by the copyright statute. In her own words, "Rodgers and Hammerstein got me $50 a week for the twenty-seven-and-a-half minutes of dance I composed for *Oklahoma!,* but no royalties. After five years, it was raised to $75 a week and some more money from the touring company."[63] In the years after *Oklahoma!*, de Mille pled for the chance to take ownership of her work as one of the loudest voices in the call for the inclusion of choreographic works in the copyright statute.[64]

The twentieth century brought an explosion of dance in America: vaudeville performers lit up Broadway's Great White Way, the movie musical rose to prominence, and American choreography truly began to come of age. Legal recognition through explicit codification represented an important step in the growth of the art form and was accomplished with the passage of the 1976 Copyright Act.

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the author's control over his work. *See* Mirell, *supra* note 59, at 793 ("If there has been reluctance to record the dance on the part of the choreographer, it has been due in no small degree, to his feeling that such recording merely increases the likelihood of plagiarism and piracy.").

61. Anthea Kraut, *"Stealing Steps" and Signature Moves: Embodied Theories of Dance as Intellectual Property*, 62 THEATRE J. 173, 177 n.18 (2010).

62. A 2010 revival performed in Washington, D.C. broke records in tickets sales and earned rave reviews from critics who suggested it might make a run to the Broadway stage. Patrick Healy, *'Oklahoma!' Revival in D.C. Generates Broadway Buzz*, ARTS BEAT, N.Y. TIMES (Nov. 10, 2010), *available at* http://artsbeat.blogs.nytimes.com/2010/11/10/oklahoma-revival-in-d-c-generates-broadway-buzz/.

63. Hilary Osterle, *Indomitable Spirit*, BALLET NEWS 11, 16 (Sept. 1983) (quoting Agnes de Mille).

64. *See* Study 28, *supra* note 54, at 110 ("Give us some chance to protect our basic rights and we will settle all other difficulties ourselves.").

C. Hardly Settled: Introduction of Choreographic Works to the American Copyright Regime

Legal theorist L. Ray Patterson said of copyright law that "[t]he modern concept of copyright is difficult, complex, and on the whole, unsatisfactory."[65] This statement encapsulates the dissatisfaction often felt by choreographers who resent the forced adherence to a requirement that is admittedly more onerous for them than for other authors[66] whose areas of work lend themselves more readily to, or even demand, fixation.[67] Adapting one law to cover a myriad of art forms is challenging. Throughout its history, American copyright law has suffered from a fundamental disconnect between the concept intended and the reality of the law's application.[68] The legislative history and inquiry leading up to the passage of the 1976 Copyright Act indicate a desire to protect choreographic works.[69] Forty-six years after its passage, it is time to question whether it has achieved its goal.

Section 101 of the 1976 Copyright Act defines the relevant terms from the statute.[70] Noticeably missing from the collection of fifty-five definitions is an exposition of the term "choreographic work."[71] The legislative history supporting the Act states that the term was deliberately undefined because it already had a "fairly settled meaning."[72] However, closer examination of the correct level of copyright protection for choreographic works reveals that the meaning

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65. PATTERSON, *supra* note 21, at 8.

66. While it may feel more appropriate to refer to these creators as artists, "author" is a term of art for creator in copyright law and used here as such.

67. *See* Singer, *supra* note 2, at 301 ("Because dance is, in essence, an intangible work of art that lives primarily through performance instead of through recordation, the fixation requirement creates a formidable obstacle to the registration of choreographic works."); *see also* Kathleen Abitabile & Jeanette Picerno, *Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 CAMPBELL L. REV. 39, 40 (2004) ("It is very hard to gain intellectual property rights for choreography because of the abstract nature of dance.").

68. *See* PATTERSON, *supra* note 21, at 144 ("The distinction between the two concepts—the one intended and the one which resulted—was fundamental.").

69. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665–67.

70. 17 U.S.C. § 101.

71. *Id.*

72. H.R. Rep. No. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666–67.

of "choreography" has been as hard to define as the art form of dance itself.[73]

When Congress passed the 1909 Copyright Act, most choreographic works followed the "story ballet tradition,"[74] at least in the sense that the works crafted their movement around a storyline. These works fit relatively easily into the protected category of dramatic works.[75] However, as the twentieth century progressed, dance began to break away from the traditional boundaries imposed by its close association with theater and music.[76] This evolution highlighted a growing divide between the art form and the law that purported to promote its progress.[77]

In the 1950s, the Copyright Office commissioned a program for the comprehensive reexamination of copyright law with an eye to its revision.[78] As part of this program, Attorney-Advisor to the Copyright Office, Borge Varmer, submitted an October 1959 report entitled "Study No. 28 Copyright in Choreographic Work," in which he makes a case for the explicit inclusion of choreographic works in the new copyright act.[79] Varmer begins by introducing and defining the term

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73. *Webster's Dictionary* defines "ontology" as "the branch of metaphysics dealing with the nature of being." Due to dance's ephemeral nature, interested scholars struggle with how to pinpoint the underlying nature of dance, its sense of being. Yvonne Rainer's call for a "pure dance" has been embraced by many as an ontology of dance—a way to define dance separately from other art forms. *See* Noel Carroll, *Theater, Dance, and Theory: A Philosophical Narrative*, 15 DANCE CHRON. 317, 318 (1992) (describing Rainer's declaration against perceived flaws of theater and their overlap with dance).

74. *See* JENNIFER HOMANS, APOLLO'S ANGELS: A HISTORY OF BALLET 171 (2010) ("The pull between a central woman (supported by a large and sympathetic *corps de ballet*) and her lover, between the demands of the community and the secret desires of the individual, would structure ballet for over a century. . . .").

75. 1909 Act § 5(d).

76. For example, Merce Cunningham famously formed his choreography through games of chance, exploring sound motifs or ideas devoid of a traditional storyline or musical score. Vanessa Kam, *Merce Cuningham in conversation with John Rockwell*, STANFORD PRESIDENTIAL LECTURES IN THE HUMANITIES AND ARTS (2005), http://prelectur.stanford.edu/lecturers/cunningham/ ("Some people seem to think that it is inhuman and mechanistic to toss pennies in creating a dance instead of chewing the nails or beating the head against a wall or thumbing through old notebooks for ideas. But the feeling I have when I compose in this way is that I am in touch with a natural resource far greater than my own personal inventiveness could ever be, much more universally human than the particular habits of my own practice, and organically rising out of common pools of motor impulses.").

77. *See* Mirell, *supra* note 59, at 792 ("The creator of the dance, the choreographer, performs an artistic and intellectual function equal to that of the music composer or literary writer. Despite this cultural fact and the admitted economic value of choreographic creations, the rights of the choreographer in his work have never been clearly defined.").

78. Study 28, *supra* note 54, at III.

79. *Id.* at 100–04.

"choreographic works," which he says is commonly understood as referring to "those more intricate dances, such as ballets, devised for execution by skilled performers for the enjoyment of an audience."[80] As used in the context of copyright, the term may refer "both to the dance itself as a conception of its author to be performed for an audience, and to the graphic representation of the dance in the form of symbols or other writing from which it may be comprehended and performed."[81]

In the 1960s, the question remained whether copyright law should protect choreographic works at all. Members of the dance community were not customary members of the legal community. Scholar Jessica Litman notes that choreographers did not attend the Copyright Office's 1960s conferences, positing that they "had no representatives to send."[82] Judging from the responses to Varmer's study, it appears that this is not entirely accurate.[83] Varmer's solicitation for comments on his report received substantial response from prominent choreographers. These comments offered widely divergent definitions of "choreographic works" and even disagreed on the baseline question of whether choreography should be copyrightable.

A few examples illuminate the differences. A well-known voice in copyright debates of the era, John Schulman,[84] suggested tying the extent of copyright protection for choreography to the extent it is reducible to a tangible form (i.e., fixed).[85] Foreshadowing the controversy to follow, Schulman commented that economic concern "is only one of the lesser aspects of the problem."[86] For most choreographers, the likelihood of substantial economic gain is slight,

80. *Id.* at 93.

81. *Id.*

82. Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 312 (1989).

83. *See* Study 28, *supra* note 54, at 109–16 (laying out the various viewpoints of commentators).

84. Schulman was counsel to the Song Writers' Protective Association and had earlier urged lawmakers to treat copyright in the same way they treated tangible property such as real estate or a car. *General Revision of the Copyright Law: Hearings Before the Comm. on Patents*, 72d Cong. 82–83 (1932) (statement of John Schulman, Counsel, Song Writers' Protective Association).

85. Study 28, *supra* note 54, at 109.

86. *Id.* at 110.

and the more important issue is creative control.[87] This concern is less easily met by U.S. copyright law's focus on maximizing the economic aspects of invention and progress.[88]

The exclusion of choreographic works from copyright law suggested that dance had no independent identity—to the deep chagrin of the dance community. Agnes de Mille wrote passionately that choreography "is neither drama nor storytelling. It is a separate art."[89] She defined choreography as "an arrangement in time-space, using human bodies as its unit of design."[90] In her definition, all inherited folk steps, classical ballet techniques, and basic tap devices are public domain, but the combination—good or bad—should be copyrightable.[91] De Mille's response glossed over the issue of fixation, pleading, "Give us some chance to protect our basic rights and we will settle all other difficulties ourselves."[92]

Other commentators seem to accept the concept of fixation: the "dean of American dance critics,"[93] John Martin, admitted that some recording is clearly required of any work to establish rights.[94] A choreographer might decline to fix his or her work, but Martin viewed this choice as on par with a musician who declines to use musical notation or a poet who refuses to learn how to read and write.[95] Martin intuited that concerns for the art form's posterity demanded some method of preservation. Tying this to the baseline for obtaining a legal right incentivizes this preservation.[96]

Not all artistic minds supported extending copyright protection to choreographic works. New York City Ballet founder, Lincoln Kirstein, concisely dismissed the need for protection for choreographic

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87. *See* Singer, *supra* note 2, at 304 n.80 ("[T]he primary interest of choreographers in maintaining the artistic integrity of their works conflicts with the Copyright Act's favoring of economic benefits at the expense of artistic concerns.").

88. *See id.* at 305 ("A dance lives primarily through a dancer's interpretation. The choreographer, therefore, will be vitally concerned with the circumstances surrounding each performance of his work.").

89. Study 28, *supra* note 54, at 110.

90. *Id.*

91. *Id.*

92. *Id.*

93. *John Joseph Martin*, AM. NAT'L BIOGRAPHY ONLINE, http://www.anb.org/articles/18/18-00796.html?a=1&n=john%20joseph%20martin&d=10&ss=0&q=1 (last visited May 7, 2012).

94. Study 28, *supra* note 54, at 111.

95. *Id.* at 112.

96. Concerns about preservation predate Varmer's Study 28. *See, e.g.*, Mirell, *supra* note 59, at 793 ("The defining of the rights of the choreographer in his works would foster the recording of choreography and, thereby develop the art form by preserving and offering for study and training masterpieces of dance creativity.").

works: "Since choreography does not have a generally legible language, since even ballet masters forget their own works within a few years, and since the actual available or useful repertory is dead of its own exhaustion every decade, I see no practical attempts at protection."[97] Kirstein betrayed his own artistic preferences, declaring categorically that not even two choreographers in a generation create work worth copying.[98] Such artistic snobbery directly contradicts copyright's consistent, aspirational attempts to avoid subjective artistic judgments.

In the end, Congress went ahead with its planned inclusion of choreographic works. The Register's Report of 1961 made clear that the "fairly settled meaning" of "choreography" included nondramatic works:

> Treating choreographic works as a species of "dramatic compositions" [under the 1909 Act], has one serious shortcoming. Many choreographic works present "abstract" dance movements in which, aside from their aesthetic appeal, no story or specific theme is readily apparent. Whether such "abstract" dances qualify as "dramatic compositions" is uncertain. We see no reason why an "abstract" dance, as an original creation of a choreographer's authorship, should not be protected as fully as a traditional ballet presenting a story or theme.[99]

The Copyright Office currently defines "choreography" as "the composition and arrangement of dance movements and patterns usually intended to be accompanied by music."[100] Notably, copyright protects choreography regardless of whether a storyline is present.[101] Like publication, presentation before an audience is no longer required.[102] The legislative history surrounding the passage of the 1976 Act clarifies that the range of protected works does not include social dance steps or simple routines.[103] The Copyright Office cautions

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97. Study 28, *supra* note 54, at 113.

98. *Id.*

99. REGISTER OF COPYRIGHTS, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 17 (Copyright Law Revision Part 1) (Comm. Print 1961).

100. COPYRIGHT OFFICE, FL 119 DRAMATIC WORKS: SCRIPTS, PANTOMIMES AND CHOREOGRAPHY (2010) [hereinafter COPYRIGHT OFFICE, FACTSHEET 119], *available at* http://www.copyright.gov/fls/fl119.html.

101. *Id.*

102. *Id.*

103. *See* H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666–67 (stating it was not necessary "to specify that 'choreographic works' do not include social dance steps and simple routines"). The term "social dance steps" is undefined and outside the scope of this Note. As the Internet makes it possible for a dance to go viral instantly and take its place in popular culture, it is interesting to consider whether popularity on such a huge scale could move a piece of choreography into the realm of "social dance" thereby depriving it of copyright

that the interaction between choreography and fixation may mean that "the minimal requirement of creativity generally necessary to copyright protection is somewhat greater in its application to dance steps and routines."[104] Such heightened standards protect the interests of the public in maintaining a body of movement that is universally available. Dance may struggle to stake its place in the pantheon of academically and socially respected art forms, but movement is fundamentally important as an integral part of the human experience.

In 1959, Borge Varmer urged Congress to grant copyright protection to choreographic works on the basis that, due to the increasing use of choreography as a medium for public entertainment in motion pictures, television, and on stage, the question of copyright protection for choreography was becoming a matter of "increasing importance."[105] More than fifty years later, dance is breaking into the mainstream in an even more significant way. It is time to reevaluate the correct balance between protection of intellectual property and preservation of the movements that unite human heritage.

III. DEFINING "CHOREOGRAPHIC WORK" VIS-À-VIS OTHER STEPS, FORMATIONS, AND TRADITIONS

Recent years have seen an emerging commercial interest in dance demonstrated in reality television shows such as *Dancing with the Stars* and *So You Think You Can Dance*, viral videos grounded in dance, and an increased potential for litigation as the choreographic greats age. Nevertheless, there has been very little actual litigation over copyright infringement of choreographic works. Choreographers have historically demonstrated an aversion to litigation. It is unclear whether this aversion springs from a disdain for the copyright law, from a trust in community norms, or from a mere recognition that it is fiscally ineffective to bring suit. Regardless, there have only been two major lawsuits involving copyright in a choreographic work since the passage of the 1976 Copyright Act, neither of which dealt with the appropriateness of the fixation requirement as applied to

protection at the exact point that this protection is most valuable. I plan to address this question in a later work.

104. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.07(B) (Matthew Bender rev. ed. 2010).

105. Study 28, *supra* note 54, at 94.

choreographic works.[106] Due to a lack of precedent, it is necessary to analogize to other forms of movement in order to analyze relevant jurisprudence. Courts and commentators have analyzed movements by athletes in greater depth than they have choreography: sports and athlete rights have been highly litigated, due in large part to the high economic stakes.

This Part first demonstrates how jurisprudence denying copyright protection to individual athletic performance and game strategy provides a concrete legal basis for retaining the fixation requirement for choreographic works. It then utilizes the traditional practice within the tap dance community of "stealing steps" to highlight the counterintuitive compatibility of fixation with an open culture of artistic education. In addition, this Part addresses multiple arguments for favoring modifications to the current system, highlighting both general and specific benefits inherent in sustaining and augmenting the current regime.

A. The Dancer as an Athlete: Using Current Sports Jurisprudence to Guide Copyright Protection for Choreographic Works

Movement not only forms the building blocks of a choreographic work, it is also the raw material that feeds the ability of the dancer. The Second Circuit has said that, "if the author of the T-formation in football had been able to copyright it, the sport might have come to an end instead of flourishing."[107] Similarly, copyrighting basic dance movements could destroy the customary foundation for training dancers. Just as if youths were prevented from learning new game strategies necessary to succeed at higher levels of competition by an overzealous enforcement of an unwisely granted monopoly, allowing the monopolization of individual movements (dance steps) could seriously inhibit the future of the art form. Indiscriminately expanded protection would be an unfortunate example of cutting off the nose to spite the face.

Increasing commercialization of dance and its incumbent profitability make the athletic analogy even more relevant. The

106. *See* Horgan v. Macmillan, 789 F.2d 157, 158 (2d Cir. 1986) (deciding whether still photographs of New York City Ballet's *Nutcracker* infringed the author's copyright in the choreographic work). In deciding the case, the court assumed the existence of a valid copyright under the existing statute. *Id.*; *see also* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624 (2d Cir. 2004) (focusing on choreography copyright ownership in the employment relationship).

107. Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841, 846 (2d Cir. 1997).

American sports industry is a multibillion dollar enterprise, cornering a significant share of broadcast attention.[108] Athletes often successfully market themselves as brands. With great sums of money at stake, individuals are highly motivated to seek to establish ownership over the moves that made them rich and famous. The potential monetary gain to the athlete who successfully copyrights his or her signature move is huge, but the cost to society of granting this monopoly would be crippling.[109] It would condone the imposition of legal sanctions on all individuals who attempt to improve their own athletic performance by emulating their heroes, while certain athletes would stand to make a lot of money in licensing fees. While savvy lawyers could conceivably manipulate such movements to fit within the statute as fixed choreographic works after the games are broadcast, there seems to be a gut feeling within the judiciary that this type of monopoly would not promote progress. Thus, judges deny copyright to athletic performance in its pure form on the basis that "[a] claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try."[110]

Proponents of copyrighting these types of individual accomplishments in movement have pointed to the Seventh Circuit's footnoted suggestion that "players' performances" contain the "modest creativity required for copyrightability."[111] However, the court's comments on originality came in the context of whether a broadcast of a sporting event was sufficiently original to qualify for copyright protection, not whether individual athletic performance could or should be copyrightable.[112] In terms of copyright, a broadcast of a sporting event is fundamentally different from the underlying athletic event: the broadcaster makes selection and arrangement choices, such as how to position the cameras that record the action, that qualify the

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108. The estimated value of the American sports industry in 2011 was $422 billion. *Sports Industry Overview*, PLUNKETT RES., LTD., http://www.plunkettresearch.com/sports%20recreation%20leisure%20market%20research/industry%20statistics (last visited Mar. 10, 2012).

109. There would certainly be enforcement issues related to an athlete exercising rights to prohibit others from performing his or her signature move: it would be quite difficult to track down each high school athlete who attempts to emulate his idol's moves. However, these enforcement issues are outside of the scope of this Note.

110. *Nat'l Basketball Ass'n*, 105 F.3d at 846. Likewise, it is an empty accolade to be the only person to achieve a specific contortion of the body, if the mover could immediately bar others from ever performing that movement.

111. Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 669 n.7 (7th Cir. 1986).

112. *Id.*

broadcast for treatment as an original work of authorship. Athletic movements come into being in response to stimuli provided by third-party actors—both on the player-author's team and on the opposing team. As such, there is an inherent reactionary element that strengthens the argument against copyright protection. The analogy between dance and athletics is not drawn to suggest that choreography should not ever be copyrightable. Rather, it is meant to demonstrate the dangers in providing overbroad copyright protection to an art form built on a fundamental aspect of humanity: the ability to move and the free will to pursue these movements to the limits of individual physical ability.

Copyright law has historically guarded against manipulations of the system that would result in effective monopolies of those things termed "useful." Merger doctrine is one principle applied by the courts to prevent the misuse of copyright to procure an unlimited monopoly.[113] This principle denies protection when the idea and its expression "merge," that is, when they become inseparable. This tenet protects not only useful items such as mannequin figures,[114] but also useful processes.[115] Athletic activities are often heralded as beneficial for society,[116] and the value of this competition is judicially recognized:

> Even where athletic preparation most resembles authorship—figure skating, gymnastics, and, some would uncharitably say, professional wrestling—a performer who conceives and executes a particularly graceful and difficult—or, in the case of wrestling, seemingly painful—acrobatic feat cannot copyright it without impairing the underlying competition in the future.[117]

Expanding copyright protection for choreographic works could have an equally damaging future effect.

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113. *See* Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967) ("When the uncopyrightable subject matter is very narrow, so that 'the topic necessarily requires,' if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated.") (internal citations omitted).

114. *See* Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985) (refusing copyright protection to mannequins on the basis of their utilitarian function).

115. *See* Baker v. Selden, 101 U.S. 99, 102 (1879) ("[T]here is a clear distinction between the book, as such, and the art which it is intended to illustrate.").

116. Campaigns urging children to get involved with sports have increased in recent years. For example, the National Football League is heavily promoting its "Play 60" program. *Play 60*, NFL RUSH, http://www.nflrush.com/play60/ (last visited Mar. 10, 2012).

117. Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841, 846 (2d Cir. 1997).

Even parents who grew up wearing jerseys and cleats, a far cry from tutus and pointe shoes, acknowledge the similarities between dance and sports.[118] While the analogy may be anathema to some dance theorists,[119] the comparison illustrates a successful and practical judicial approach to claims that could have derailed a significant part of human life: the ability to use one's body to compete. This need to use movement is heightened by the claim advanced by Elsa Posey, a past president of the National Dance Education Organization, that dance is an art not a sport, meaning "[i]n art, the competition is within oneself."[120] Copyright is meant to recognize the reality that economic incentives are necessary to guarantee that authors will find it worthwhile to turn their talents toward creating; it is not meant to limit the ability to create. In order to advance creation of choreographic works, authors must be able to push the limits of their minds and bodies without limitations on the steps they can employ. Allowing the thick copyright protection advocated by some theorists would undermine the customs of dance that made it a "useful art" worth promoting.

The dance world has historically been a close-knit community governed by a set of fluid customs that police the line between respecting artistic integrity and contribution and allowing the swapping of knowledge required to keep the art moving forward.[121] In order for the copyright law to fulfill its constitutional mandate, it must find a way to promote that progress rather than hinder it.

B. Authorized Theft: Tap Dance's Tradition of Swapping Beats and Stealing Steps

Most choreographic works through a significant portion of American legal history lacked copyright protection. Choreographers invented their own community norms to protect their intellectual

118. *See, e.g.*, Erika Kinetz, *Budding Dancers Compete, Seriously*, N.Y. TIMES, July 7, 2005, http://www.nytimes.com/2005/07/07/arts/dance/07danc.html (" 'I played sports all my life, and I've never seen anyone work as hard as they do,' said Dennis Spitzer, a physical therapist from Fresno, Calif., who had come with his wife to watch their 10-year-old daughter, Lindsay, compete at the Waldorf with the Dance Studio of Fresno. 'They are going out there to win. If they don't win, they feel as badly as we do when we lose. It's not dance. It's a sport.' ").

119. *Id.*

120. *Id.*

121. *See, e.g.*, Lakes, *supra* note 14, at 1830 (stating that, historically, protections against unauthorized copying were successful because of the close-knit nature of the dance community).

property.[122] Nowhere is this more apparent than in the tap dance community. Celebrated "hoofer,"[123] Ralph Brown referred to the "artful knowledge" of stealing steps.[124] During the glory days of tap dance in the first half of the twentieth century, there was no official protection for choreographic works, let alone for tap steps.[125] Not only were these steps left without legal protection, aspiring tap dancers could not evolve without taking the initiative to emulate them. As Brown recounted, "Once in a while you might get someone to show you how to do a step, but not many that would take you by the hand and carry you through it."[126] The solution? "You would just have to steal it. That's the way it went."[127]

This is not to say that no protections existed for the tap dance innovator. As tap dancer Baby Laurence[128] explained, "They watched you like hawks and if you used any of their pet steps, they just stood right up in the theater and told everybody about it at the top of their voices."[129] All dancers, choreographers, and performers received notice that the most holy commandment of the tap community was "Thou shalt not copy anyone's steps—exactly."[130] This rule embodied both a concern for protecting an individual's right to his or her creation and an intense focus on improving the art form.

In today's globalized world, using a step "on the same stage" as its originator becomes a stickier issue. For those authors who want to protect their work, fixation and the attendant legal recognition become more imperative. A good illustration is the recent controversy surrounding performing artist Beyoncé's music video for her song

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122. *See generally* RUSTY E. FRANK, TAP! THE GREATEST TAP DANCE STARS AND THEIR STORIES 1900–1955 (recounting multiple versions of the freedom and limits of the ability to steal others' steps); Singer, *supra* note 2 (describing the evolution of customs within the dance community, which imposed its own sanctions for inappropriate uses of another's creations).

123. A "hoofer" is a tap dancer who trains and performs what is often perceived as "rhythm tap."

124. FRANK, *supra* note 122, at 94.

125. *Id.* ("Dancers would watch each other with a keen, gleaning eye, ready to grab any and all appealing steps. And if a dancer was good enough to figure out a tap step, it was for the taking. There was no such thing as copyrighting a tap step.").

126. *Id.* at 97.

127. *Id.*

128. *Tap Dance Hall of Fame: "Baby Laurence" Jackson*, AM. TAP DANCE FOUND., http://atdf.org/awards/laurence.html (last visited Mar. 13, 2012) (" 'Baby Laurence' Jackson has been hailed as a jazz dancer of the rarest of rhythmic phenomena whose fluid beats, melodic phrasings, and instrumentalized conceptions moved him in the category of jazz musician.").

129. MARK KNOWLES, TAP ROOTS: THE EARLY HISTORY OF TAP DANCING 207 (2002).

130. *Id.* at 207 ("Most dancers realized that 'stealing steps' from other dancers was the best and quickest way to expand their own repertoire.").

Countdown. She is accused, both by the press and by the choreographer of the similar work, of infringing Belgian modern dance choreographer Anne Teresa De Keersmaeker's copyright in her work *Rosas Danst Rosas* and the filmed version of the same work, *Achterland*.[131] At this time, no one has filed a lawsuit, but this incident presents a useful current example of the issues discussed in this Section. The dance community has historically been quite open and urges increased exposure to its art. However, as the world shrinks, there is less space available where another artist can steal a step and incorporate it into the artist's performance without infringing on the original author's market. As De Keersmaeker stated in response to the music video:

> People asked me if I'm angry or honored. Neither. On the one hand, I am glad that *Rosas danst Rosas* can perhaps reach a mass audience which such a dance performance could never achieve, despite its popularity in the dance world since 1980s. And, Beyoncé is not the worst copycat, she sings and dances very well, and she has a good taste! On the other hand, there are protocols and consequences to such actions, and I can't imagine she and her team are not aware of it.[132]

The norms by which the dance community has historically policed itself have a significant and relevant place, but copyright law helps to level the playing field by providing a method of redress for those whose artistic expression is commandeered to significant commercial effect.

By requiring the affirmative step of fixation, modern copyright law allows the dance community to easily manage and perpetuate the large public domain that feeds the progress of the art form. No one is required to fix her choreographic work. If the author feels strongly about leaving it in the public domain, then no extra action is required, unlike in the case of written works, where copyright protection automatically attaches.[133] Although requiring an additional step for legal protection might be described as onerous, this structure actually respects and supports the artistic traditions of the dance community. Given the importance of artistic expression within the field, this satisfies an expressionist goal not met by a more expansively codified

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131. *See* Matt Trueman, *Beyonce Accused of 'Stealing' Dance Moves in New Video*, THE GUARDIAN, Oct. 10, 2011, http://www.guardian.co.uk/stage/2011/oct/10/beyonce-dance-moves-new-video.

132. *Statement of Anne Teresa de Keersmaeker*, ROSAS (Oct. 10, 2011), http://www.rosas.be/nl/news/read-anne-teresa-de-keersmaekers-press-declaration-about-plagiarism-beyoncés-videoclip-countdow.

133. In the latter case, authors must take the extra step of "giving up" the rights they desire to leave in the public domain through inclusion in the Creative Commons, among other methods.

legal system. Allowing choreographers to decide what to fix and when to fix it respects the creative concerns of choreographers more substantially than imposition of government determinations of which version best captures the artistic vision behind the work. If the dancer—the artist's medium—makes a mistake, the choreographer can throw out that version and protect another, better, copy. Due to the fact that any dance relies on the ability of the dancers performing it, removing this additional step would remove artistic control. This removal is not likely to achieve copyright's goal of incentivizing continued creativity.

IV. SYNCHRONIZING CHOREOGRAPHY AND COPYRIGHT

The explicit inclusion of choreographic works in the 1976 Act is a positive step. However, given the historical divergence between theoretical intent and practical function, mere inclusion in the discussion should not end the conversation. In the forty years since choreographic works gained statutory recognition, many theories have emerged professing to set forth the best way to resolve the problem of copyright protection for choreographic works. This Part analyzes these theories in light of the customs of the dance community, the purpose of the copyright statute, and functional concerns undergirding the art form at issue.

Although the passage of the 1976 Act opened the definition of fixation to include "any tangible medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device,"[134] Labanotation and video recording are still the preferred methods of fixation for choreographic works.[135] This arises mostly from practical concerns of intelligibility—random scribbles, while intelligible to their creator, may be incomprehensible to any other human or machine. However, while copyright theorists find Labanotation and video recording practical, both methods of fixation arguably fail to preserve the essence of the work.

So then, is fixation serving the purpose of copyright? Is it effectively promoting the progress of the art of dance? Given the 1976 Act's explicit recognition of choreographic works as a separate species worth protecting, it is important to consider dance in its own right,

134. 17 U.S.C. § 102(a) (2006).

135. COPYRIGHT OFFICE, FACTSHEET 119, *supra* note 100.

rather than vis-à-vis more academically established art forms such as music or literature.

The 1976 Copyright Act allows protection for any original work of authorship fixed in any tangible medium of expression now known or later developed,[136] but the realities of dance as an art form cause possible fixation methods for choreographic works to fall into essentially two categories: notation (most commonly Labanotation) and video recording. Each method has significant flaws that frustrate dance theorists and legal commentators alike. Yet, when all the goals of copyright are analyzed together, it becomes clear that the fixation requirement for choreographic works should be preserved from a theoretical standpoint and must be preserved from a practical standpoint.

A. The Stabilizing Force of Fixation

Movement is not created: it is found. As such, copyright law should treat it like a preexisting fact waiting to be discovered. The movement in a choreographic work is intimately tied to the motor skills that form a significant part of what it means to be a human being: moving one's arms in a balletic port-de-bra is very similar to raising a hand to ask a question; a stylized run in a modern dance piece is still fundamentally a run, akin to running to escape a dangerous situation. To deny an able-bodied man the ability to move his body in any way his physical makeup will allow would be to drastically curtail a portion of the natural rights that we relate with the ability of man to be free. By viewing movements as facts, it becomes clear that only the specific selection and arrangement, as fixed in a tangible medium of expression, should be copyrightable.[137]

The 1976 Copyright Act explicitly does not protect "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[138] Individual steps should fall within this prohibition. The fixation requirement documents the selection and arrangement needed to move a choreographic work into the realm of protection. This rewards originality in movement-based art, while maintaining the necessary repertoire of public domain

136. 17 U.S.C. § 102(a).

137. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) (holding that only the specific "selection and arrangement" of facts may be accorded copyright protection).

138. 17 U.S.C. § 102(b).

movement. As will be demonstrated below, other solutions proposed to fix the relationship between copyright and choreographic works fail to maintain the appropriate balance between protection of art and preservation of publicly available movement.

One argument is that the fixation requirement overly restricts choreographers and should be waived.[139] It is possible that the recent trend of harmonization with international law will lead to an elimination of fixation as a general requirement of copyright protection. Slowly but surely, U.S. copyright law has let go of formalities out of synch with Berne provisions.[140] However, given Berne's explicit identification of fixation as an issue to be left to member states,[141] fixation seems fairly well entrenched in the American copyright scheme. Failure to do so opens the door for privatization of movement on a large scale. Even if it is true that choreographers have consciously declined to take advantage of available copyright protection, the increasing commercialization of dance is likely to change this dynamic. Contestants on the Paula Abdul-headed *Live to Dance* competed for $500,000—certainly enough to litigate over.[142]

Growth of an artistic community can bring innovation and progress, but it can also break down cultural norms. Legal commentator Joi Lakes argues that choreographers will be less likely to acquiesce to copying now that there are far more players who can assert copyright protection.[143] Associate professor of dance at University of Buffalo and the National Educational Chairman of Dance Masters of America, Tom Ralabate, told the *New York Times*, "I think the organizers of these competitions are thinking: 'This is a business.' "[144] The transition away from a small, self-policing artistic community increases the necessity for a clear statutory framework.

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139. Krystina Lopez de Quintana, Comment, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 150, 171 (2004).

140. *See* COHEN ET AL., *supra* note 37, at 149 (discussing changes made to notice and registration requirements for works distributed after adoption of the Berne Convention).

141. Berne Convention, *supra* note 39, at art. 2, ¶ 2.

142. *About Live to Dance*, CBS.COM, http://www.cbs.com/primetime/live_to_dance/about/ (last visited Mar. 11, 2012).

143. Lakes, *supra* note 14, at 1860.

144. Kinetz, *supra* note 118, at E1.

Concern about monopoly creation undergirds American copyright law.[145] This concern supports the need for a fixation requirement for choreographic works in order to maintain an objective marker for the line between publicly available movement and privately owned art. Unlike a painter who transmits his vision from his hand directly to the canvas (via the appropriate artistic tools), a choreographer relies on living, breathing third parties to provide the raw materials for her creations.[146] Dance is so subjective that we do not want to award a monopoly covering every iteration dreamed up in the head of the choreographer. If the door were open, choreographers could make an (often good faith) argument that their dance included x, y, and z visions in addition to the one performed at a given show. Removing the fixation requirement would remove the guidepost for determining exactly what is protected from unauthorized copying. Fixation prevents an unscrupulous author from expanding his monopoly by claiming his copyrightable work encompasses multiple versions and combinations of movement rather than a set selection and arrangement of steps as demonstrated by the fixed work.

Certainly there is a flipside to this argument: many choreographers have a set artistic vision in their minds and have no intention of manipulating copyright protection to gain rights to more than this specific vision. For example, shortly before his death, Merce Cunningham told friends that although his health was clearly fading, he was still composing dances in his head.[147] Assuming these dances were not fixed before his death, Cunningham's company has no legal rights in the works. This is an economic and artistic loss to the company, but the lack of fixation results in another, arguably greater loss to society which will not be exposed to this work. Some legal scholars argue that one of the main justifications for fixation is that it preserves art and allows public exposure to the works.[148] Given the relative inconvenience of fixing a choreographic work, removing the fixation requirement would create a substantial disincentive to fix

145. *See, e.g.*, Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967) (explaining that merger doctrine is developed in order to prevent effective use of copyright to acquire a monopoly in a useful object or process).

146. *See* Singer, *supra* note 2, at 305 ("A dance lives primarily through a dancer's interpretation. The choreographer, therefore, will be vitally concerned with the circumstances surrounding each performance of his work.").

147. Macaulay, *supra* note 13.

148. *See* Yoav Mazeh, *Modifying Fixation: Why Fixed Works Need to be Archived to Justify the Fixation Requirement*, 8 LOY. L. & TECH. ANN. 109, 122 (2008) ("The point that is suggested is that society is not enriched by the fact that a work has been created. Rather, society is enriched because it is exposed to, and interacts with, the work.").

works. While it is true that the very ephemeral nature of dance contributes to its power as an art form, true social importance and utility require that society have access to the work—able to interact with it and absorb its significance.[149]

Interaction with previous works and ideas is key to progress: "[T]he very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea."[150] Yet, arguments for strengthening copyright protection are often premised on the idea that heightened copyright protection is necessary to adjust the balance between the creative individuals who bring new works into being and the greedy public who hopes to free ride off these creations.[151] According to section 101 of the 1976 Act, "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[152] The phrase "under the authority of the author"[153] means the author has ultimate artistic authority over what is copyrighted. Locating the onus of fixation at the author provides a safety valve that diminishes the impact of the traditional arguments against fixation via video recording. An inherent worry with video recording has been that it captures more than the work: it also codifies any mistake made by the author's third-party medium, the dancer.[154] No choreographer wants his statutory work to contain an instance of a dancer tripping and falling in the middle of his solo. Section 101 guards against this: a work is not fixed until the author says it is fixed, so the author can choose to throw out versions with which he is unsatisfied. In this instance, the Copyright Act internally provides an argument in favor of fixation.

Some commentators suggest that copyright protection be granted to all choreographic works regardless of fixation, with the added requirement that a mandatory license be granted to all those

149. *Id.*

150. Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990).

151. *Id.*

152. 17 U.S.C. § 101 (2006).

153. *Id.*

154. *See* Lopez de Quintana, *supra* note 139, at 160 ("Video recordings often fail to capture the choreographer's actual intent, since a film version of the work significantly depends on the skill and accuracy of the dancer. A number of elements can go wrong: a dancer may miss a step, execute the movement at a different angle, miss the rhythm or beat of the music, or fail to capture an emotion.") (citation omitted).

who are willing to pay.[155] A belief that all uses of copyrighted materials must be affirmatively licensed by prospective users negatively affects the preservation of materials documenting dance legacy as well as the public's access to this part of its cultural history. Dance education is already quite expensive, and costs would only rise if teachers had to pay for the right to teach these movements, as they tried to pass costs off to the final consumer.[156]

The previous paragraphs laid out a theoretical justification for preserving the fixation requirement. It is important to note the extremely substantial practical concerns that also demand the existence of a fixation requirement. Commentators agree that choreography tends to be a nonlucrative field.[157] If fixation is not required before infringement can be alleged, litigation over choreographic works will be a battle of the experts. Expert testimony is far more cost prohibitive than even notation. Contrary to legal commentator Krystina Lopez de Quitana's argument that fixation skews the field in favor of large dance companies, removing the fixation requirement would eliminate small, less successful choreographers from the discussion.[158] It is far cheaper to play a recording of the dance for the jury than to hire an expert to opine on similarities or differences.

One of the most influential commentators on the intersection of dance and copyright, Barbara Singer, wrote the first comprehensive article on the intersection of copyright and choreographic works shortly after the passage of the 1976 Act.[159] Singer felt that the dance community's customs were a more effective protection than Congress's solution and urged reliance on community norms rather than the imperfect copyright regime.[160] However, the growth in the dance

155. In other words, these commentators urge lawmakers to import the concept of mandatory licensing found in music to the realm of choreographic works.

156. Although it may strain credulity to imagine a lawsuit against a twelve-year-old ballet student who is simply trying to improve her basic technical skills, the potentially lucrative nature of infringement claims has led to some equally surprising lawsuits. *See, e.g.*, Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151–52 (N.D. Cal. 2008) (outlining a suit against a mother who posted a YouTube video of her toddler dancing because a copyrighted Prince song was faintly audible in the background).

157. *See, e.g.*, Lakes, *supra* note 14, at 1854 (discussing the prohibitive cost of recording choreography in written notation).

158. *See* Lopez de Quintana, *supra* note 139, at 159 (arguing that fixation methods are only feasible for the few commercially successful dance companies).

159. *See generally* Singer, *supra* note 2.

160. *See id.* at 318 ("The time-honored custom of the dance community is therefore an effective, yet sensitive means of preserving choreographic rights.").

community occurring by the time Singer offered her solution has taken a significant commercial turn in recent years. Fixation helps to guard against commercially backed movement monopolies, but is also flexible enough to allow room for the continued vitality of custom. The more effective change to the current copyright system is to incentivize creation through official recognition (via explicit statutory inclusion) of the value of choreography separate from fixation, while requiring fixation as a quid pro quo for the ability to enforce legal rights in the work.

B. Retaining Fixation and Fixing Creation

Congress should amend the 1976 Copyright Act to reflect the reality that art has progressed in many directions and that often creation and fixation are not simultaneous.[161] It is appropriate for Congress to require the extra step of fixation, but it must be acknowledged that this imposes an extra step in the case of choreographic works. While explicit statutory recognition of this added burden on authors of choreographic works might not cause substantial legal change, the principle behind recognition is vital. The purpose of American copyright law is to encourage innovation. Not acknowledging the reality of dance as it exists and evolves sends the message to would-be choreographers that their contributions do not matter. While there may not be a one-to-one correlation between the wording of the copyright statute and the creation of choreographic works, over time a poorly worded statute has the potential to severely retard innovative progress.

The Copyright Act should be modified in order to move choreographic works more squarely beneath the umbrella of protection and to reflect the reality of the current status of those art forms that Congress has termed the "useful arts." Section 101 of the Act defines creation in terms of fixation: "A work is 'created' when it is fixed in a copy or phonorecord for the first time."[162] This language ignores the fundamental difference between creation and protection of art.

The language of creation in the 1976 Copyright Act should be amended to reflect the diversity of creative methods within the "useful

161. *Cf.* 17 U.S.C. § 101 (2006) (defining creation in terms of the moment of fixation). This inappropriate linkage is the current copyright law's significant flaw with respect to its treatment of choreographic works.

162. 17 U.S.C. § 101.

arts."[163] Creation must be unlinked from fixation. It is fair to acknowledge that creation is a term of art in the context of the 1976 Act. However, creation is also a normatively loaded term, connoting the moment at which a person, idea, or work came into being.[164] Denying protection may be progress maximizing, but denying a work's very existence hinders progress by implying that society does not find the work worth acknowledging. Nothing in a utilitarian or moral rights view suggests that it is necessary to pass this judgment. In fact, even if it is appropriate to sort works into categories of protected and unprotected, declaring that an art form by its very nature does not exist will not incentivize creation within that art form. The Constitution grants to Congress the authority to demand the extra step of fixation as a quid pro quo for copyright protection,[165] but Congress must acknowledge that it is an extra step. The acknowledgment prevents trivialization of art forms that do not fit easily into the one-size-fits-all language of the 1976 Copyright Act.

V. CODA: THE CURRENT CURTAIN CALL FOR COPYRIGHT AND DANCE

It is universally difficult to craft a rule, standard, or law that effectively governs a wide variety of situations. Copyright law faces a particularly difficult challenge because it attempts to balance the competing interests of society and the individual. The ephemeral nature of dance makes it tricky to define and more difficult to protect. The fixation requirement in American law elicits especially loud criticism from commentators on copyright protection for choreographic works. Yet, despite the undeniable flaws of the system from the perspective of the individual choreographer, fixation remains supported by theoretical and practical concerns.

At the heart of copyright law is the goal of promoting progress by striking the optimal balance between providing appropriate economic incentive for creators through the granting of a limited monopoly[166] and maintaining a robust public domain for consumption

163. *See generally id.* § 102(a) (defining categories of "works of authorship").

164. For example, nearly every culture has its own version of a creation myth.

165. *See* U.S. CONST. art. I, § 8, cl. 8 (defining Congress's authority to protect intellectual property); Barry J. Swanson, *The Role of Disclosure in Modern Copyright Law*, 70 J. PAT. & TRADEMARK OFF. SOC'Y 217, 218 (1988) (discussing the argument that the "fundamental policy" of copyright law is the exchange of public knowledge for monopoly protection).

166. *See* Litman, *supra* note 150, at 969–70 (discussing the purpose of copyright law).

for society at large.[167] In order to protect this balance, the 1976 Act explicitly denies protection to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[168] Movement is universally and intrinsically tied to the human condition. We arrive at movement in the way a traveler reaches, rather than creates, his destination. As such, it is equivalent to fact, and we should take care not to inappropriately increase the legal monopoly available to compilers of movement.

Fixation moves choreography from the realm of the theoretical to the concrete. It provides an economic and artistic incentive to artists that preserves the public's natural right to discover movement for themselves. Restricting copyright protection to works that are fixed does not deprive choreographers of the rights most dear to them: control over how, when, and by whom the work is performed.[169] Rather, it allows the choreographer to designate an official version of his artistic vision while also protecting his economic rights. A work is not fixed unless the fixation was established under the authority of the author.[170] This provision supports the desire of the choreographer for ultimate artistic control, particularly important in this case because the medium is a third party.

Maintaining the current fixation requirement for dance while modifying the language of the Copyright Act to reflect the reality that, for some art forms, fixation is an additional step independent of creation will not change the fact that copyright law uncomfortably straddles the line between what it is meant to do and what it does in practice. By its very nature as a noncriminal branch of the law, intellectual property disputes require significant sums of money to litigate successfully. However, the playing field is inherently unequal;

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167. *See id.* at 977 ("[A] vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all . . . .").

168. 17 U.S.C. § 102(b).

169. *See* Singer, *supra* note 2, at 305 ("The choreographer, therefore, will be vitally concerned with the circumstances surrounding each performance of his work.").

170. 17 U.S.C. § 101.

preserving the fixation requirement levels, rather than exacerbates, this inequality. American copyright law can recognize dance as an art form without sacrificing the goals of copyright or severely limiting the public domain. Once the law acknowledges that creation can occur independent of fixation, choreographers can move forward as equals on the copyright stage and can make a real decision about whether to collaborate with the law or remain a soloist.

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