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Copyright and Choreography: What Constitutes Fixation?

I. Introduction

It is the late 1950s. A teenaged Michael Jackson and his date run out of gas in a dark, wooded area. They walk off into the forest, and Michael asks her if she would like to go steady. She accepts and he gives her a ring. He warns her, however, that he is "different." A full moon appears, and Michael begins a convulsing in agony – transforming into a horrifying werecat. His date shrieks and runs away, but the werecat catches up, knocking her down and begins lunging at her with his claws. The scene cuts away to a modern-day movie theater, where Michael and his date – along with a repulsed audience – are actually watching this scene unfold in a movie called "Thriller" starring Vincent Price. Michael's date is scared, but he is clearly enjoying the horror flick. Frightened, his date leaves the theatre. Michael hands his popcorn to the stranger next to him, and catches up to her, smiling and saying "It's only a movie!" Some debate follows over whether or not she was scared by the scene; she denies it, but Michael disagrees.

Michael and his date then walk down a foggy street, and he teases her with the opening verses of "Thriller". They pass a graveyard, where corpses begin to rise from their graves as Vincent Price performs his rap. Michael and his date then find themselves surrounded by the zombies, and suddenly, Michael becomes a zombie himself. Michael and the undead perform an elaborate song and dance number together, followed by the chorus of "Thriller" during which Michael is changed back into human form: ¹

'Cause this is thriller, thriller night
And no one's gonna save you from the beast about strike
You know it's thriller, thriller night
You're fighting for your life inside a killer, thriller

Thriller, thriller night
'Cause I can thrill you more than any ghoul would ever dare try
Thriller, thriller night
So let me hold you tight and share a
Killer, thriller, ow, killer, thriller here tonight
'Cause this is thriller, thriller night
Girl, I can thrill you more than any ghoul would ever dare try

¹ Wikipedia, *Michael Jackson's Thriller*, http://en.wikipedia.org/wiki/Thriller_video (last visited September 21, 2009).

Thriller, thriller night
So let me hold you tight and share a killer, thriller, ow!²

The iconic Thriller dance, choreographed by Michael Peters, has become engrained in the hearts and minds of society, especially with the recent passing of the King of Pop, the one and only, Michael Jackson. The Thriller music video mesmerized audiences when it was released on December 2, 1983.³ And, to date, it has been consistently referred to as the greatest music video ever made because of its elaborate cinematography and unrivaled choreography.⁴ The Thriller dance is arguably the most performed choreography - by choreographers, professional dancers, and the general public alike - of all time.

Through the years there have been innumerable movies, television shows, commercials, and web videos that have showcased either re-enactments or re-performances of the Thriller dance. For example, in the 2004 movie "13 Going on 30," Jennifer Garner's character, Jenna, decides to enliven a dull promotion party by requesting the DJ to play Michael Jackson's Thriller.⁵ After Jenna starts dancing a few steps of the Thriller dance, a crowd joins in and performs the entire dance, ultimately saving the party.⁶ Another example was found in the midst of last year's Super Bowl. During a commercial break, Sobe Life Water premiered a commercial where supermodel Naomi Campbell and the Sobe lizards broke into the Thriller dance after drinking Sobe Life Water.⁷ The Thriller dance has also been performed on various television

² Elyrics, *Thriller Lyrics-Michael Jackson*, <http://www.elyrics.net/read/m/michael-jackson-lyrics/thriller-lyrics.html> (last visited September 21, 2009).

³ Mike Celizic, *Thriller remains a classic 25 years later*, <http://www.msnbc.msn.com/id/24282347/> (last visited December 9, 2009).

⁴ *Id.*

⁵ IMDb, *13 Going on 30*, <http://www.imdb.com/title/tt0337563/plotsummary> (last visited December 1, 2009).

⁶ *Id.*

⁷ NFL, *Sobe Life Water Thriller*, <http://www.nfl.com/videos/nfl-super-bowl/09000d5d80675100/SB-XLII-ad-SoBe-Life-Water-Thriller> (last visited December 1, 2009).

shows, including the ever popular Saturday Night Live.⁸ Most recently, the professional dancers from the reality television show, “Dancing with the Stars,” performed a tribute to Michael Jackson by re-enacting the Thriller dance live for millions of viewers.⁹

Online, a Google search of “Michael Jackson Thriller Dance” returns approximately 4.08 million results.¹⁰ Specifically on YouTube, the video sharing website where ordinary people can upload anything from home-movies to television show spoilers, the search “Michael Jackson Thriller” returns 187,000 results.¹¹ And, after browsing of the results, it is apparent that this popular dance has been performed by countless wedding parties across the world during receptions and even church processions. But, what is arguably the most popular rendition of Michael Jackson’s original Thriller dance is the Filipino prisoner video, which has over 36 million views to date.¹² In the video, hundreds of Filipino prisoners, sporting their orange jumpsuits, performed the Thriller dance in the prison courtyard.¹³

Taking into the account the grand scale of fame and popularity attached to the Thriller dance, assume that choreographer Michael Peters expected the Thriller dance to be successful and sought to protect his authorship of the dance. If Peters submitted for copyright protection immediately after the Thriller video was released, would the Thriller dance satisfy the requirements of the copyright? And, if so, do all these subsequent performances constitute an infringement of copyright? This article generally discusses the topic of copyright as it relates to

⁸ Amit Chowdhry, *Iman Crosson’s Barack Obama Thriller Parody is a Hit*, <http://pulse2.com/2009/11/09/iman-crossons-barack-obama-thriller-parody-is-a-hit-video/> (last visited December 7, 2009).

⁹ MichaelJackson.com, *Michael Jackson Tribute on Dancing with the Stars*, <http://www.michaeljackson.com/us/news/michael-jackson-tribute-dancing-stars> (last visited December 1, 2009).

¹⁰ <http://www.google.com/search?hl=en&source=hp&q=Michael+Jackson+thriller+dance&aq=f&oq=&aqi=g-p1g9> (last visited December 8, 2009).

¹¹ http://www.youtube.com/results?search_query=michael+jackson+thriller&search_type=&aq=f (last visited December 8, 2009).

¹² YouTube, *Thriller*, <http://www.youtube.com/watch?v=hMnk7lh9M3o> (last visited December 8, 2009).

¹³ *Id.*

choreography. Specifically, this article focuses the current and prospective forms of fixation that would satisfy the copyright requirement, and whether these forms of fixation are in line with the customs of the dance community.

First, this paper addresses the history and requirements of copyright. Next, it discusses the customs of the dance community and its criticisms of the copyright law. Then, it addresses the advantages and disadvantages of the commonly used forms of fixation. Finally, it proposes three new forms of fixation, which will allow for more flexibility in fulfilling the fixation requirement and thus incentivize choreographers to obtain copyright protection.

II. Requirements of Copyright

The Copyright Act of 1976 states that “copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁴ The Act explicitly states that works of authorship include choreographic works.¹⁵ In addition, the Act makes special note that copyright protection does not extend to expressions or ideas.¹⁶

A. History

The 1909 Federal Copyright Act limited protection to “useful” art forms, such as motion pictures or books, because they told stories and taught lessons.¹⁷ These lessons were to help the society grow strong and maintain high moral character. The Copyright Act of 1947 finally

¹⁴ Copyright Act, 17 USCA § 102 (1976).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

extended protection rights to choreography, but the Act required the choreography to be classified as dramatic or dramatic-musical composition.¹⁸ This meant that the work had to convey a “serious story” in order to become eligible for consideration for a copyright.¹⁹ In 1952, Hanya Holm became the first choreographer in the United States to gain copyright protection for her choreographic work by registering a notated score of her choreography for the Broadway musical *Kiss Me Kate* as a dramatic-musical composition.²⁰ However, the dramatic or dramatic-musical composition requirement proved to be a difficult standard to meet. For example, George Balanchine, cofounder and balletmaster of the New York City Ballet, was rejected after applying for copyright protection of his “Symphony in C” as a ballet in 1953, however, in 1961, when he resubmitted it as a motion picture, it was quickly granted protection because it told a story and was “useful” to society.²¹

At this point, there were three major reasons why Congress did not extend copyright law to choreography. The first had to do with the “usefulness” of choreography in relation to its impact or benefits on society.²² For, dance was not yet considered able to touch peoples’ lives as compared to a romantic movie or play. The second reason was that choreography would only be deemed worthy if it was part of a dramatic work, so as to convey a moral tone.²³ The third reason was that Congress hesitated to include abstract choreography because it was difficult to define.²⁴

¹⁸ Copyright Act, 17 USCA § 102 (1976).

¹⁹ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 41 (2004).

²⁰ Cheryl Swack, *The Balanchine Trust: Dancing through the Steps of Two-Part Licensing*, 6 Vill. Sports & Ent. L.J. 265, 282 (1999).

²¹ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 42 (2004).

²² *Id.*

²³ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 42 (2004).

²⁴ *Id.*

It was not until the late 1960s that Congress began to extend copyright protection to “abstract” choreographic works.²⁵ Then, changes ensued for the dance community. The definition and inclusion of abstract choreography was especially important because modern choreography was, and still is, often built as a series of abstract movements.²⁶ Finally, in 1976, copyright protection was extended to abstract choreography when Congress deemed choreography a “separate viable form of art.”²⁷ Despite the grant of protection, Congress did not clarify what constituted a choreographic work. In response, the Copyright Office defined choreography:

Choreography is the composition and arrangement of dance movements and patterns usually intended to be accompanied by music...To be protected by copyright...choreography need not tell a story or be presented before an audience...Choreography may also represent a series of dance movements and patterns organized into a coherent whole.²⁸

To date, there have been very few federal copyright infringement cases concerning choreography. Most notably, in Horgan v. MacMillan, the owner of copyright in choreography for a ballet brought copyright infringement actions against publishers and authors of a book containing photographs depicting performance of ballet.²⁹ The case was originally heard in the district court, where the court determined that “choreography is the flow of steps in ballet.”³⁰ And, because the claim was based on a photographic medium, “the still photographs...do not, nor do they intend to, take or use the underlying choreography.”³¹ The photos are simply

²⁵ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 42 (2004).

²⁶ *Id.*

²⁷ *Id.* at 43

²⁸ *The Compendium of Copyright Office Practices*, Compendium II § 450.01 & §450.03(a) (1984).

²⁹ *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 158 (2nd Cir. 1986).

³⁰ *Id.*

³¹ *Id.*

“catching the dancers in various attitudes at specific instances in time,” thus they could not infringe the copyright because the photos could not enable the ballet to be reproduced.³²

This decision was significant because it demonstrated to the dance community that only a trained professional should be able to make such a determination because choreographers could gain a wealth of information about a specific dance or performance from photographs.³³ Based on this issue, the case was brought on appeal to the United States Court of Appeals for the Second Circuit. The Court of Appeals decided that a “snapshot of a single moment in a dance sequence may communicate a great deal” and an ordinary observer could perceive much more than a mere gesture or position.³⁴ The court further held that the test for determining whether copyright in the ballet was infringed was not whether the ballet could be reproduced from the photographs, but whether the photographs were substantially similar to the ballet.³⁵ The case was reversed and remanded back to the District Court to determine whether copyright protection had been breached.³⁶ To the community, the Horgan case not only illustrates the necessity for Congress to provide an improved definition of choreography, but also a need for a better outline of specific provisions for copyright protection of choreography.³⁷

The community is reasonable in soliciting Congress for a clearer definition and outline of provisions for the copyright of choreography. However, it is unrealistic for the legal system to accommodate the dance community’s underlying demand of equipping the courts with dance professionals in order to properly determine infringement cases. For, this would inevitably

³² *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 158 (2nd Cir. 1986).

³³ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 *Campbell L. Rev.* 39, 42 (2004).

³⁴ *Horgan v. MacMillan, Inc.*, 789 F.2d 157, 158 (2nd Cir. 1986).

³⁵ *Id.*

³⁶ *Id.*

³⁷ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 *Campbell L. Rev.* 39, 47 (2004).

eliminate the Seventh Amendment and require the creation of special choreography courts to hear infringement cases. Although specialized courts have been administered in areas such as tax and bankruptcy, these courts cover a broader spectrum and magnitude of cases dealing with governmental matters. In addition, it is not the responsibility of the court to educate itself in the field of dance and choreography, it is the responsibility of the trial counsel to educate the court on the matters at hand by arguing and producing evidence to aid in the litigation and determination of infringement.

B. Originality

The Copyright Law requires an “original work of authorship” in order to be eligible for copyright protection.³⁸ The classic test of originality is not novelty, but “whether the production is the result of independent labor.”³⁹ Customarily, a choreographer is influenced by his predecessors and will borrow elements from choreographers who inspire him, which does not automatically exclude his work from copyright.⁴⁰ This is due to the fact that there are a limited number of steps and sequences used in choreography, especially when working exclusively within one type of genre, such as ballet. A congressional report suggested that choreographic works would be lacking in sufficient originality if movements are “so simple or so stereotyped as to have no substantial element of creative authorship.”⁴¹ The Copyright Office offers similar restrictions in its publications, stating “social dance steps, folk dance steps, and individual ballet

³⁸ Copyright Act, 17 USCA § 102 (1976).

³⁹ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 62 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁴⁰ Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 150 (2004).

⁴¹ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 63 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

steps” are for choreographers as words are for writers, and in themselves, cannot be copyrighted.⁴²

To determine what Congress meant by originality in choreography, many commentators compare it to originality in music.⁴³ Courts look to the three building blocks of musical compositions in analyzing the originality: rhythm, harmony, and melody.⁴⁴ Most importantly, the court relies on whether the work bears the author's personal stamp.⁴⁵ The court will deem the overall work original if it finds the rhythm, harmony, and melody are recognizable, but the author's imprint is innovative.⁴⁶ Relying on this analogy to music, many commentators argue that a court determining originality in choreography should look at three building blocks: rhythm, space, and movement.⁴⁷ In addition, commentators argue that the work should be considered original if it bears the choreographer's personal stamp.⁴⁸ And since some ballets may use many of the same steps, a choreographer's interpretation will be the deciding factor for determining originality.⁴⁹

The issues concerning originality can be addressed in terms of the elements of many typical dance performances:

(1) basic “steps,” from either established or newly-created movement vocabularies, which are (2) combined in sequences of several steps, (3) for one or more dancers, (4) in a performing area, (5) to the accompaniment of music, (6) for the purpose of telling a story and/or communicating or expressing human

⁴² Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 63 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁴³ Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 156 (2004).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

emotions or feelings, (7) with the aid of a mime, costumes, scenery, and lighting...⁵⁰

It is well established that basic steps are not sufficiently “original,” however, when they are combined in sequences, the sequences can be new and novel.⁵¹ But, many combinations are deemed belonging to the public, and skeptics wonder whether any combination could actually meet the statutory requirement of originality.⁵² To increase the likelihood of originality based on the visual pattern, the choreographer can utilize additional dancers and have the groups perform the sequences at different times.⁵³ The performance space may also be original or an integral part of the work if the stage or the entire venue is used as part of the performance.⁵⁴

Although the music used to accompany dance movements is separately copyrightable, the choice of a particular musical accompaniment for a certain combination of steps might be considered an original element of a choreographic design.⁵⁵ On the other hand, the plot or the story, as well as the emotions feelings expressed by the dancers, would not meet the requirements of originality.⁵⁶ And, the costumes, scenery, and lighting would most likely be eligible for protection as “pictorial, graphic, and sculptural works” rather than part of the choreographic work.⁵⁷

⁵⁰ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 63 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁵¹ *Id.* at 64.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 65 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁵⁶ *Id.*

⁵⁷ *Id.*

C. Derivative Work

A derivative work is defined as a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole represent an original work of authorship.⁵⁸ In creating derivative works, it is sometimes permissible to use preexisting material. A derivative work will be separately copyrightable if it is based in whole, or substantial part, upon a preexisting work...[and] it satisfies the requirements of originality.⁵⁹ The material transforming the preexisting work must be more than a minimal contribution in order to satisfy the originality requirement.⁶⁰ Thus, the standard used to ascertain a work's originality is whether the author has created a “distinguishable variation” that is more than “merely trivial.”⁶¹

Choreographic works may be considered derivative in two ways. First, numerous choreographic works are derived from traditional classical ballets in the public domain.⁶² If the material is copyrighted, permission must be obtained from the original author. When a choreographer creates his own version of a preexisting ballet, he receives copyright protection only for his added original expression if it is substantially based on the preexisting work and is “more than a trivial variation.”⁶³ If the preexisting material is in the public domain, the choreographer may use it without permission, but use of the material must be acknowledged in the copyright registration distinguishing the original contributions.⁶⁴ Second, a dance specially

⁵⁸ Copyright Act, 17 USCA § 101 (1976).

⁵⁹ Cheryl Swack, *The Balanchine Trust: Dancing through the Steps of Two-Part Licensing*, 6 Vill. Sports & Ent. L.J. 265, 282 (1999).

⁶⁰ *Id.*

⁶¹ *Id.* at 283.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 75 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

choreographed to a specific musical score or sound recording may be derivative.⁶⁵ The choreography would be both a distinguishable variation of, and substantially based on, the preexisting music since the dance is a visualization of the choreographer's auditory response to the music.⁶⁶

Revisiting the Thriller example, none of the re-performances of the Thriller dance qualify as derivative works because the original steps were used in each of the performances. One can argue that the formations, amount of performers, the expressions, and the costumes, or lack thereof, used in the re-performances constituted a distinguishable variation from the original dance as portrayed in the Thriller video. However, this argument is unconvincing because there is no distinguishable variation in the steps and sequences, which are the copyrighted components of the work. Accordingly, the differences mentioned above would be considered merely trivial. Without a distinguishable variation, the work does not meet the originality requirement and cannot be deemed derivative.

D. Expression vs. Idea

As previously mentioned, the Act makes special note that copyright protection does not extend to expressions or ideas.⁶⁷ Legislative history clearly illustrates that this provision is intended to codify the “dichotomy between expression and idea.”⁶⁸ Both the House and Senate Reports characterize the exclusions as “intellectual concepts.”⁶⁹ For example, the ballet concept of an “examination of good and evil through an allegory involving swans” would be excluded

⁶⁵ Cheryl Swack, *The Balanchine Trust: Dancing through the Steps of Two-Part Licensing*, 6 Vill. Sports & Ent. L.J. 265, 282 (1999).

⁶⁶ *Id.*

⁶⁷ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 66 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁶⁸ S. Rep., 54;H.R. Rep.,57.

⁶⁹ S. Rep., 54;H.R. Rep.,56.

from protection.⁷⁰ But, non-verbal ideas are not subject to this exclusion, as in choreography the dance movement itself is the “message” or idea.⁷¹ As Lincoln Kirstein, a cultural figure in New York who co-founded the New York City Ballet, has stated, “increasingly, ballets fail to tell stories...they are about the dance itself, just as symphonic music is about sound.”⁷² Thus, if the movement patterns meet the other requirements of copyrightability, they should be protected, since this non verbal sense of “idea” is not the intent of Congress.⁷³ Further, the decisive test for an excluded “idea” would seem to be whether it could be described verbally in conceptual, as opposed to strictly descriptive, terms.⁷⁴

E. What constitutes copyright infringement?

Under copyright law, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁷⁵

⁷⁰ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 66 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁷¹ *Id.*

⁷² *Id.* at 67.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ 17 U.S.C.A. § 106.

For the purposes of choreography, the most frequent infringement would be a violation of the exclusive right “to perform the copyrighted work publicly.”⁷⁶ In assessing whether there has been an infringement of a choreographic work, the courts look to whether the alleged copy is “substantially similar” to the original work.⁷⁷ The showing of substantial similarity is made by comparison of the infringing performance to the protected work. But, the question remains, how similar is substantially similar? The courts generally apply the “ordinary observer” test for similarity to all the categories of copyright, including choreography.⁷⁸ Specific to choreography, substantial similarity is easily identified in performances with:

(1) identical movements by the same ensemble of dancers as provided in the fixation of the protected work, or (2) identical movements by the same ensemble in one or more discrete sections, movements, or variations, as fixed in the notation or other medium.⁷⁹

Accordingly, if there is no substantial similarity, other than the use of a few standardized steps, in a dissimilar sequence, there is no threat of infringement.

By utilizing the above definition of substantial similarity and applying it to the Thriller dance, which has been re-performed countless times since its creation, it is arguable that the all of the re-performances of the Thriller dance, spanning from the professional movies to the amateur web videos, infringe on the original copyrighted work. For, each of the subsequent performances uses the exact steps and sequences danced in the original Thriller music video, tailored only for time and space purposes. In fact, all of these re-performances are meant to

⁷⁶Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 72 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁷⁷ Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 150 (2004).

⁷⁸ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 76 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁷⁹ *Id.* at 72.

imitate the Thriller dance, which has become an iconic movement in society since the video was released in the 1980s and even more so since the recent passing of Michael Jackson.

It can be argued that a poorly executed rendition of the Thriller dance may not constitute clear infringement because the performers lack technical dance skills; thus, the performers do not capture the essence of the protected movements and sequences in their re-performance. Whether the re-performance is substantially similar to the original work shall be determined by the court under the ordinary observer test. In applying this test, the court will determine infringement based solely on the use of the copyrighted steps and sequences in the re-performance and not on the proper execution of such movements. As a result, even a seemingly dissimilar and poor re-performance of a copyrighted dance may constitute infringement, unless the movements are so badly performed that they are not recognized as the copyrighted steps and sequences.

F. Remedies

The proper remedy for copyright infringement is widely discussed among scholars.⁸⁰ The Copyright Act affords economic protection for most artistic forms by compensating injured artists with monetary damages.⁸¹ However, monetary damages are often inadequate for choreographers who are primarily concerned with preserving the character of their work.⁸² Thus, most choreographers forgo copyright protection and instead rely on the customs of the dance community to ensure their works will be performed with artistic integrity.⁸³

⁸⁰ Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 152 (2004).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Conversely, choreographers fail to recognize the deterrent effect of enforcing copyright protection through the legal system. If a choreographer is successful in litigating an infringement case, the result would not only compensate the choreographer with monetary damages, but also signal to the dance community and to society that the work is protected and thus may only be re-performed through license with the original choreographer. This, in turn, preserves the character of the choreographer's work, and attributes the work's authorship to the original choreographer. This is especially important when a dance, such as Thriller, becomes increasingly popular, and people outside the dance community, such as filmmakers in Hollywood or amateurs on the web, may re-perform it. Not being a part of the dance community, these potential infringers will not be subject to, nor effected by, the self regulation within the community. Thus, it is imperative that choreographers seek broader protection through federal copyright law.

III. Customs of the Dance Community

The dance community generally includes the choreographers, performers, audience, critics and historians.⁸⁴ And, although the amended Copyright Act of 1976 specifically includes choreographic works, a majority of choreographers still have not taken advantage of copyright protection for their works.⁸⁵ There are several reasons for this phenomenon, all stemming from the inherent self regulation within the dance community. Many choreographers feel that the customs of the dance community more adequately address their needs than do the provisions of the Act.⁸⁶ Two predominant customs are choreographic credit and choreographic control.⁸⁷

⁸⁴ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 74-75 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

⁸⁵ Barbara Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. the Custom of the Dance Community*, 38 U. Miami L. Rev. 287, 289 (1984).

⁸⁶ Edwina M. Watkins, *May I Have This Dance?: Establishing A Liability Standard For Infringement Of Choreographic Works*, 10 I. Intell. Prop. L. 437, 444 (2003).

Choreographic credit is the practice of attaching the choreographer's name to every performance or work that he created without regard to whether the choreographer, his company, or some other entity has legal ownership of the work.⁸⁸ Choreographers receive credit through announcement of their names at the beginning or end of the performance, and publication of their name in the performance handbill.⁸⁹ Such credit informs the audience of the author of the work and prevents confusion as to the artistic and creative origin of the work.⁹⁰ For example, Michael Peters, assuming he was on the list of credits when the Thriller video was released, received choreographic credit in the dance community for his Thriller choreography. Although, it is important to note that this credit depends on the cooperation of the directors, producers, and theatres involved, all of whom are not necessarily a part of the dance community.

Choreographic control, on the other hand, grants the choreographer control of his works post performance or production, when the works have been released to the public.⁹¹ This means that dance companies, who later want to produce the choreographer's work, seek permission directly from the choreographer to do so. Both parties enter into a licensing agreement, where the dance company has rights to a certain number of performances of the work for a certain period of time.⁹² The choreographer is then entitled to a licensing fee, as well as royalties from each performance.⁹³

The terms of the licensing agreement normally allow the choreographer to maintain artistic control through supervision of rehearsals, participation in staging of the work, and power

⁸⁷ Edwina M. Watkins, *May I Have This Dance?: Establishing A Liability Standard For Infringement Of Choreographic Works*, 10 I. Intell. Prop. L. 437, 443 (2003).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 444.

⁹² *Id.*

⁹³ *Id.*

to make choreographic changes to the work.⁹⁴ Through specific terms in the negotiated licensing agreement, the choreographer also maintains the right to withdraw the work from the licensee if he feels that the dance company is incapable of sufficiently performing the work with artistic integrity.⁹⁵ For example, after *Thriller* was released to the public, any subsequent groups who wanted to use the *Thriller* choreography yet avoid backlash from the dance community, would have had to seek license directly from Michael Peters and been subject to his discretion as to how the piece was to be re-performed. However, if the subsequent performers were not part of the dance community, they would not have been subject to, nor effected by, the self-regulation. Yet, if the work was legally protected, all subsequent performers would be subject to federal copyright law.

Although it seems the economic incentives to pirate are no less than in other contexts, the self regulatory customs of the dance community are rarely breached due to peer pressure and threat of marred reputation.⁹⁶ And even if they are, the dance community is reluctant to seek legal remedies because:

choreographers view unlicensed performances as a risk of the trade...or free publicity...prefer to rely on negotiation of peer pressure in settling their differences with breaching licensees...are discouraged by the costs involved in bringing suit...that may strain the budget and patience of struggling choreographers...[realize that] the small amounts of lost profit resulting from the breach...fail to justify legal effort...[and fear that] legal enforcement of the contract may not offer much relief...⁹⁷

⁹⁴ Edwina M. Watkins, *May I Have This Dance?: Establishing A Liability Standard For Infringement Of Choreographic Works*, 10 *I. Intell. Prop. L.* 437, 444 (2003).

⁹⁵ *Id.*

⁹⁶ Barbara 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, 296 (1984).

⁹⁷ *Id.*

This is especially true if the choreographer is not in a position of equal bargaining power due to his financial situation. It is because these customs alone appear to sufficiently address the choreographer's needs that the dance community has taken to self regulation.

Additionally, the dance community believes the provisions of the Act illustrate a lack of understanding of the art of choreography and the dance community itself. First, the dance community encompasses a broader definition of choreography than that illustrated by the Act.⁹⁸ "Among members of that community, choreography is loosely defined as anything a choreographer presents to the public" without regard to manner or form of creation.⁹⁹ The Act sets forth a threshold of originality, yet leaves the term "choreographic work" undefined with a note that it was not "necessary to specify that choreographic works do not include social dance steps and routines."¹⁰⁰ For the dance community, this portrays a minimum level of difficulty that must be met before a work can be protected, yet may alternatively result in the inability to copyright highly innovative or very simplistic works because they are grounded in common or basic components.¹⁰¹

However, the Copyright Office has defined choreography as the composition and arrangement of dance movements and patterns usually intended to be accompanied by music, which may also represent a series of dance movements and patterns organized into a coherent whole.¹⁰² And, through the Act, Congress has incorporated a broader definition

⁹⁸ Edwina M. Watkins, *May I Have This Dance?: Establishing A Liability Standard For Infringement Of Choreographic Works*, 10 I. Intell. Prop. L. 437, 445 (2003).

⁹⁹ Barbara 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, 297 (1984).

¹⁰⁰ H.R. Rep. No. 94-1476, at 53-54 (1976).

¹⁰¹ Edwina M. Watkins, *May I Have This Dance?: Establishing A Liability Standard For Infringement Of Choreographic Works*, 10 I. Intell. Prop. L. 437, 445 (2003).

¹⁰² *The Compendium of Copyright Office Practices*, Compendium II § 450.01 & §450.03(a) (1984).

of choreography, including abstract pieces which need not tell a story to be copyrightable.¹⁰³ Thus, this criticism of the Act by the dance community is moot.

Second, choreographers are concerned with the originality requirement of the Act, especially since the federal courts have not assessed the sufficient level of originality necessary for works.¹⁰⁴ This stems from the fear that courts may render many choreographers' works un-copyrightable because they consist of individual dance steps, which in themselves are un-copyrightable.¹⁰⁵ The dance community, however, believes that a choreographer's work should be copyrightable "[a]s long as the dance bears the choreographer's individual stamp [i.e. "the choreographer's treatment of rhythm, space and movement in the work"]...[regardless of whether his] dance uses well known or often used steps."¹⁰⁶ These competing notions, as well as the courts lack of artistic knowledge when it comes to choreography, concern the dance community. On this matter, the dance community solution is purely self-serving. For, every interest group desires a monopoly on what they believe to be exclusively theirs, but this notion is legally both unrealistic and unattainable in today's society.

In addition, the community believes that such legal requirements allow the legal system to judge the originality of the choreographic works, which may be imperceptible to the untrained eye, creating an obstacle nearly impossible to overcome.¹⁰⁷ Similarly, choreographers worry that the court, because it lacks expertise in the field of dance and

¹⁰³ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 42 (2004).

¹⁰⁴ Edwina M. Watkins, *May I Have This Dance?: Establishing A Liability Standard For Infringement Of Choreographic Works*, 10 I. Intell. Prop. L. 437, 445-46 (2003).

¹⁰⁵ *Id.* at 446.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

choreography, will not be able to adequately determine whether an infringement has occurred. For, newer choreographers often push the limit, creating obscure or abstract pieces, which they believe the courts are ill-equipped to make artistic judgments about their works.¹⁰⁸ Courts apply the “ordinary observer” test to all the categories of copyright, yet the court doesn’t know “how to look” at the dances to determine infringement.¹⁰⁹

This is a naïve criticism of the legal system because it is the trial counsel’s responsibility to put the court in the appropriate frame of reference through expert testimony or otherwise. It is true that the court lacks expertise in the field of dance, just as in other artistic and even scientific fields. Nonetheless, the court is simply to make a fair and unbiased determination based on the facts and evidence presented by counsel. Thus, the dance community is at no disadvantage when compared to every other litigant that appears in court.

Finally, the choreographers view the fixation requirement as a technical burden unnecessary for copyrightability.¹¹⁰ This topic is discussed thoroughly in the remainder of the article.

IV. Fixation Requirement

Fixation has been one of the foundational elements of copyright from the time when the Copyright Act was first instituted. Copyright notice, aided by the requirement of fixation, has since served as the legal signal to the public that a work is protected and

¹⁰⁸ Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 150 (2004).

¹⁰⁹ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 76 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

¹¹⁰ Edwina M. Watkins, *May I Have This Dance?: Establishing A Liability Standard For Infringement Of Choreographic Works*, 10 I. Intell. Prop. L. 437, 446 (2003).

cannot be freely used or performed. Accordingly, fixation is the element of the Act that most concerns choreographers and the dance community. It requires the work to be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹¹¹

A. Creation

The creation process is unique to each choreographer; it may take weeks, months, even years to create a choreographic masterpiece.¹¹² The process begins when the choreographer finds his inspiration and translates it into a sequence of movements.¹¹³ The choreographer then polishes the movements and considers whether the steps are feasible enough so the dancers can properly execute them.¹¹⁴ And, after weeks of practicing and refining the steps, the dancers are ready to take the stage and the choreographer consults with specialized designers for the final elements of costumes, lighting and sets.¹¹⁵ Despite this process, courts have decided “regardless of the number of times a dance has been publicly performed, a choreographic work is created when it is fixed in a copy for the first time.”¹¹⁶ The Thriller choreography thus became copyrightable when it was “created,” meaning when it was first filmed in the Thriller music video.

¹¹¹ Copyright Act, 17 USCA § 102 (1976).

¹¹² Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 145 (2004).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 44 (2004).

An issue arises with the court's definition of creation: "a choreographic work is created when it is fixed in a copy for the first time."¹¹⁷ Whether fixed in film or notation, the dance is the creation of the choreographer. But, what if the dance is filmed and thereby fixed by the producer or director of the show in which the dance is performed? Legally, the author of the work is the one who creates it, which under the court's definition would be the person who fixes it. This however does not pose a significant problem for the dance community. For, it is common in the dance community for the choreographer to have a side agreement with the producer or director concerning the initial electronic recording and reproduction of the dances. In these situations, the directors or producers are acting as agents to the choreographers so as not to affect their rights to copyright and protect their work.

B. Common Forms of Fixation

As stated above, the courts have decided that "regardless of the number of times a dance has been publicly performed, a choreographic work is created when it is fixed in a copy for the first time."¹¹⁸ The Act requires a work to be fixed in a tangible medium of expression, meaning the work must be set in a stable and permanent medium, whereby it will be perceived or reproduced, based on its recognizable traits.¹¹⁹ Through the years, two common forms of fixation have evolved to satisfy this requirement: film and notation. Each form has various advantages and disadvantages, which will be discussed in detail below.

¹¹⁷ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 44 (2004).

¹¹⁸ *Id.*

¹¹⁹ Copyright Act, 17 USCA § 102 (1976).

1. Film

The first established form of fixation is film, which is normally created by video-taping a performance. It is a stable and permanent form of fixation because it is easily copied and will stand the test of time. The main advantage of using film over other forms of fixation is that it is very inexpensive.¹²⁰ Depending on the financial status of the choreographer, he may simply make a home movie of the performance instead of hiring a professional camera crew to capture the performance. Nowadays, choreographers would not even need a video camera to record a performance. Instead, choreographers can use their personal computers or smart-phones, most of which have audio-visual recording functions. But, if the choreographer does not trust himself or have the technological capability to adequately tape the performance of his work, a professional camera crew can be hired for as little as \$175 due to increased technology and decreased demand.¹²¹

Another advantage of using film is that it captures a visual representation of the work. A visual representation allows the work to both be seen and engrained in the minds of the public, allowing it to be easily perceived and reproduced. A visual form of fixation leaves little room for frivolous arguments in defense of an alleged infringement because it permits the court to easily compare the protected work to that of a potential infringement by looking for substantial similarity in the movements and formations.

Although filming a performance to fulfill the fixation requirement has obvious advantages, it also has a variety of disadvantages. One such difficulty results when a large group performs the work. Film cannot capture all the individual movements, as well as the

¹²⁰ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 53 (2004).

¹²¹ *Id.*

group designs, because inevitably some dancers will be visually blocked by others, or performers dancing the solo numbers will become the main focus of the camera.¹²² So, in this respect, film may be less detailed than another form of fixation, such as notation, unless the choreographer focuses on capturing the entire performance at every point throughout the performance.

Although the film recording may capture every element of a performance, yet another issue arises in that the film captures only a single performance. Technically, the film captures an interpretation of particular group of dancers rather than the choreographer's intent.¹²³ In this respect, the recorded work is significantly more detailed than the notational method. John Martin, a long time dance critic for the New York Times, commented that:

A film is a recording, not of the composition itself, but of a specific performance of it, which is no more an interpretation or adaptation by performers and consequently may depart radically from the choreographer's...intent.¹²⁴

If this is true, then the interpretation should be protected as part of the original work. For, it would be nearly impossible to identify which aspects are part of the choreographic work and which are the interpretations of the performers.

Whether the interpretation of the choreographer's original work is part of that work and thus protected is yet another issue. Should the choreographer receive credit for the performers' facial expressions, fluidity and grandness of the dancer's movements? Legally, the choreographer is the author of the original work and should not receive credit for the

¹²² Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 69 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

¹²³ *Id.* at 68.

¹²⁴ *Id.*

interpretation.¹²⁵ But, there is no simple solution to this problem because it is difficult to separate the true work from the interpretation.¹²⁶ Thus, some courts have included the interpretation in the protected work.¹²⁷ This is similar to the copyright of a play or screenplay, which also depends on the actor's or the director's interpretation of the characters portrayed by the writers.

A viable option may be to have the choreographer himself perform the piece and record his own performance. But, this will be problematic if the performance involves more than one dancer. It has been suggested by Julie Van Camp in her law review article that, for simplicity, there should be a presumption that the choreographer has contributed all protected elements of the work, including the interpretive elements, with the burden on the challenger to show otherwise.¹²⁸ On the other hand, one can argue that the performers and choreographers should be considered joint authors.¹²⁹ But this is inconsistent with the practices in the dance community and the current registration practices of copyrights.¹³⁰

Similarly, another issue exists as to which version of a work constitutes the copyrighted work when there have been many interpretations and revisions.¹³¹ This issue is also apparent in the copyright of a song or a play, which are also subject to frequent interpretation and revision. Under the Act, "each version constitutes a separate work," so long as it has been fixed; and, works "prepared over a period of time, the portion of it that

¹²⁵ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 68 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 69.

has been fixed at any particular time constitutes the work as of that time.”¹³² This may be at odds with the impression of the dance community, which recognizes the multiple works, under a legal context, as a single work.¹³³ For example, in genres such as ballet, the same work is continuously revised for each season of performances, although the basics remain the same. The dance community would recognize the dance as a single work, whereas legally each season the revised dance would constitute a separate work.

2. Notation

The second established form of fixation is choreographic notation. Labanotation, or Laban Dance Notation, is primarily used in the United States and was developed in the eighteenth century when many dancers and choreographers read and understood notation.¹³⁴ The form declined in popularity because ballet steps became more complex and innovative new styles of dance emerged.¹³⁵ However, today Labanotation remains the most accurate method of preserving and reproducing works.¹³⁶

Labanotation is a written dance notation system based on a vertical staff marked with symbols representing movements.¹³⁷ For example, below is a copy of the notation for Friedrich Albert Zorn’s *La Cachucha*:¹³⁸

¹³² Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 69 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

¹³³ *Id.*

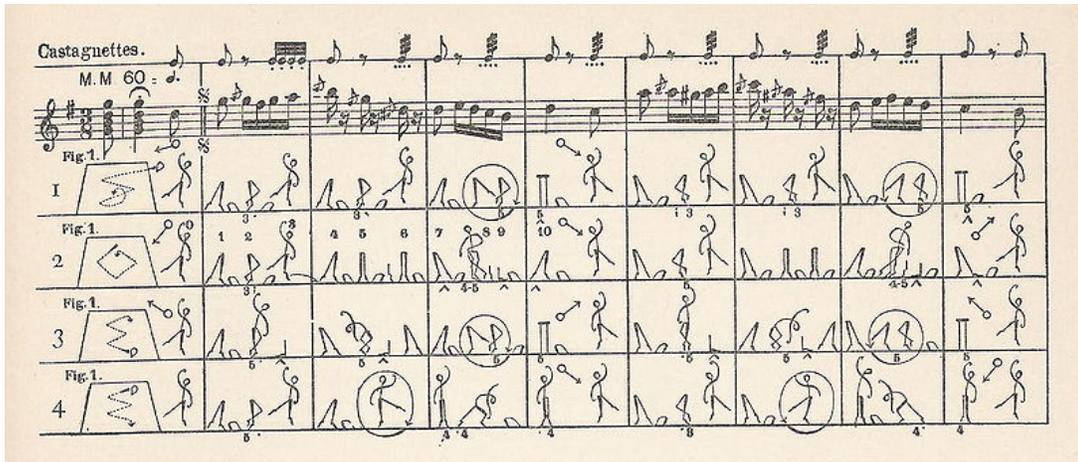
¹³⁴ Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 159 (2004).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Cheryl Swack, *The Balanchine Trust: Dancing through the Steps of Two-Part Licensing*, 6 Vill. Sports & Ent. L.J. 265, 281 (1999).

¹³⁸ Wikipedia, *Notation: La Cachucha by Friedrich Albert Zorn*, http://en.wikipedia.org/wiki/Dance_notation (last visited October 23, 2009).



As seen above, notation is exceedingly difficult to follow, let alone understand, for anyone with an untrained eye. Similarly, musical notation, although more commonly used by professional and amateur musicians alike, is also not readily identifiable to someone without a trained eye. The use of notation may lead to confusion and unintentional infringement of copyright, since most choreographers, let alone the general public, cannot read or write notation. In addition, notation will be difficult for the courts to analyze when determining if an infringement has occurred. But as previously stated in this article, the burden is on the trial counsel to help the court understand and come to a determination. Overall, the notational form is often preferred by choreographers because it can more efficiently and effectively grasp the objectives of the choreographer, while not including any of the mistakes or interpretations caught on film.¹³⁹ As noted by Peter Martins, Ballet Master of the NYC Ballet, “when you make a dance for the stage, you work with a straight

¹³⁹ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 54 (2004).

line, a circle, a semicircle, a diagonal...there are options...On television (video), these options become distorted.”¹⁴⁰

The main disadvantage to using notation is that it is a very expensive form of fixation. For example, twenty minutes of dance notation can cost upwards of \$10,000.¹⁴¹ As stated above, notation is hard to decipher, thus it is not readily perceivable or reproduced. Due to this, specialized notational computer programs have been recently developed and almost exclusively relied upon by choreographers.¹⁴² Merce Cunningham was one of the first choreographers to use computer technology to record his work.¹⁴³ Cunningham was able to fix movements exactly as he wanted them performed by using a computer program that allows the user to manipulate three-dimensional figures.¹⁴⁴ The program provides three-dimensional views from every angle, helping dancers learn and understand the movement free of human error.¹⁴⁵ Despite their promise, these programs are not widely available to all choreographers at present. Even if they became widely available, many choreographers would not use the programs because they cannot express the fundamental choreographic element of emotion.¹⁴⁶ Because notation is impractical due to its cost and lack of popularity within the dance community, this form of fixation risks becoming obsolete in the near future.

¹⁴⁰ Kathleen Abitabile & Jeanette Picerno, Article, *Dance and the Choreographer's Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 Campbell L. Rev. 39, 54 (2004).

¹⁴¹ *Id.* at 53.

¹⁴² Kristina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 Vill. Sports & Ent. L.J. 139, 161 (2004).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

3. Double Submission and Prevalence

A question arises as to what is considered the choreographic work when more than one form of fixation is submitted to the Copyright Office. Does the visual fixation trump the notation or vice versa? Does the work only consist of those elements contained in both forms of fixation? Or is the film simply a supplement to the notation or vice versa? It can be argued that the discrepancies between the film and notation constitute, prima facie, the interpretive and unprotected elements of the work, which may help solve the issue of separating the choreographic elements and interpretive elements of a work.¹⁴⁷ On the other hand, a film can serve to clarify notation since notation is not easily decipherable, or notation can serve to clarify a dance captured on film by filling any gaps or mistakes in the performance. The issue also arises when litigating copyright infringement of a musical work. Authors of musical works similarly use two forms of fixation: musical score and musical recording. These forms may also be used separately, or in combination, to fix and portray the author's original work.

Since, legally, no one form trumps another, the court should use the form of fixation that best captures the aspect of the performance that has been infringed upon. If neither form alone can solve the underlying issue in the infringement suit, the court should allow the use of both forms of fixation, in combination, to thoroughly analyze and fairly determine the outcome of a copyright infringement action.

¹⁴⁷ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 69 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

4. Extrinsic Evidence

A final issue with the various forms of fixation is whether a form of fixation, which does not capture all the elements within in a dance, covers all the uncaptured elements as well. One of the problems identified above concerning film as a form of fixation, is that the film does not capture the entire piece, comprised of all the performers and their movements at all times. So, for example, if a group of dancers are performing separate movements, and one dancer is blocked by another, or simply not within the scope of the camera, is that dancer's movement part of the work? No, if film is the only form of fixation provided, the missing dancer's movement is not legally considered part of the original work because there is no evidence of that movement. Thus, choreographers should deposit multiple forms of fixation to capture the work in its entirety.

In addition, the court should consider any and all extrinsic evidence in determining the outcome of an infringement suit. This will aid the court in analyzing the underlying issues within the case, as well as educate the court in the field of dance, thereby addressing one of the dance community's main concerns. By allowing admission of expert testimony into evidence, the court will better understand the case and the issues at hand and aid the court in determining whether the alleged infringing work is substantially similar to the original work. For example:

The historian can identify sources of material by a famous choreographer from which the new work was clearly derived...The critic can point out features of the work to help the court see the work with more sophistication...The movement analyst can point out similarities and differences to the court...¹⁴⁸

¹⁴⁸ Julie Van Camp, *Copyright of Choreographic Works*, in PUBLISHING AND THE ARTS HANDBOOK 59, 77 (Stephen Breimer, Robert Thorne & John David Viera eds., New York: Clark, Boardman and Callaghan 1994) (1993).

Such testimony would be beneficial to the court and would ease the concerns of the dance community in allowing the untrained court system to protect its works. This argument holds true for other copyrightable art forms as well. For, the court would benefit from expert testimony in infringement cases involving music or playwright, where, as here, the court is similarly unarmed with the requisite knowledge necessary to fairly determine the outcome of the case. Thus, it is essential that the court allow such evidence to be admitted.

C. New Forms of Fixation:

So the question remains, what other ways can a choreographer fulfill the fixation requirement under the Act? And, is there potential for these forms to satisfy the fixation requirement while keeping in line with the customs of the dance community? The remainder of this article suggests three new forms of fixation and evaluates the advantages and disadvantages of each. Further, it evaluates whether the proposed forms align with the customary practices of the dance community. The three proposed forms are: written step-by-step dance instruction, audio recording of the step by step dance instruction and informal choreographer notes.

1. Written Step by Step Dance Instruction

The first form of fixation is created by a choreographer writing out, step by step instructions for his original dance. These instructions could be written in layman's terms or incorporate technical dance step terms as the choreographer chooses. For example, written dance instructions, in laymen terms, for Michael Jackson's Thriller dance would read:

For the Chorus: Stand with your feet apart (about as wide as your shoulders) and swing your hips from the right to the left three times (while leaning to your right). Then, tuck your body in and release, so that your left leg is pointing out to the left side and your right arm is pointing straight out to your right side. Land on your left foot, and then swing your hips from left to right two times. Tuck your body and release into a “roar” stance. Step to the right while maintaining the “roar” stance, and then step to the left. Face front and fall at the waist while jiggling your entire body. While keeping your left foot planted, step in a clockwise circle. Look up to the left when you get to 9 o’clock. Then walk forward with your hands on your hips (right, left, right, left).¹⁴⁹

One could argue that such instructions may not provide a clear picture as to how the dance is supposed to be performed, thus does not make the performance readily perceivable or easily reproduced. However, as discussed above, it is the steps and sequences of the routine which are ultimately copyrighted, not the performance. This form of notation would be inexpensive and simple for any choreographer to create; for, it would only require a computer or a pen and paper. This form would require little effort to edit because, as the dance changes, the choreographer can easily retrieve the document, whether electronic or paper, and edit it as he sees fit. Although, a computer document is considerable more stable and permanent because a saved and backed up electronic copy will stand the test of time better than a written sheet, which is susceptible to destruction. And, such a clear step by step description would resolve many disputes as to copyright infringement because it can be followed by both the general public and trained choreographers.

However, obstacles would arise if the piece involved a number of performers or a series of simultaneous complex movements. It would also prove difficult for a choreographer to communicate a cohesive piece that could be followed by a group of

¹⁴⁹Lyndsey D’Arcangelo, *Michael Jackson’s Thriller Dance Steps*, www.ehow.com/way_5397138_michael-jacksons-thriller-dance-steps.html (last visited September 21, 2009).

performers simultaneously dancing sequences of movement. In addition, it may be challenging to convey a choreographer's newly developed dance step, which has no name or is not readily describable.

Furthermore, in order to fully describe the movements involved in the dance, the choreographer must be very detailed in his description. For example, when the instructions call for a "step to the right" in the Thriller dance, a question as to whether this alludes to a three-inch step or a three-foot step would arise. Trying to sufficiently describe each movement may prove to be overly burdensome on the choreographer and deter him from using this method of fixation. This also severely limits the scope of the copyrighted work, which may cause problems for the choreographer in court if the infringing dance does not strictly conform to the explicit instructions. In these situations, a visual representation may be more suitable.

2. Audio Recording of Step by Step Dance Instruction

Another similar option to fulfill the fixation requirement is for the choreographer to verbalize the steps and sequences of his original dance in an audio recording. The advantages and disadvantages of this form are similar to those of the written step by step dance instruction. An audio recording is stable and permanent and will stand the test of time.

An audio recording is another way for the choreographer to convey the basic precepts of the performance as well as the step by step movements in an efficient and inexpensive manner. This form of fixation simply requires a voice recorder, which would easily be able to record the choreographer's train of thought. Nowadays, hand held tape

recorders, although seldom used, are a viable option. More frequently used options include a laptop or even a smart-phone, such as an I-phone. A choreographer may effortlessly run an audio recording program and speak into it. Although, it is important to note that this form of fixation may be harder to edit as compared to the written step by step description since the choreographer would need to be familiar with the use and workings of the chosen audio recording device.

On the other hand, an audio recording, just as the written instruction, would not explain how the dance is to be performed unless the choreographer takes the liberty of reciting such details or giving an introduction to his work. And, again it may be difficult to convey on the recording if different groups of performers were to dance simultaneously or if the choreographer incorporates a newly created step into the performance. The difficulty and tenuousness of having to explicitly describe each movement, and the limiting function of such prescribed detail, is yet another disadvantage. In these situations, a visual recording may be more suitable.

3. Choreographer Notes

The third option to fulfill the fixation requirement is the use of the choreographer's own notes throughout the creation and execution of the piece. This would evidence the idea behind the piece and may include the steps, sequences, and movements to be performed. It will also encompass any changes made from the creation to the performance. However, the main concern with allowing a choreographer's notes is that it may be an incomplete or inaccurate representation of the dance. If the Copyright Office were to take handwritten notes scrawled all over sheets of paper, the original dance would most likely

be indecipherable. If the notes do not clearly portray the steps and sequences of the dance, this would leave too much room for frivolous and indeterminable infringement disputes.

In order for this form to fulfill the requirement of fixation, a standard must be set for choreographers to follow. This can be achieved by providing standard copyright application forms – specifically catered to the choreography category - with sections for ideas, steps and sequences, and details of performance to be filled in.¹⁵⁰ This may not be practical for choreographers who experiment while creating their dance and make changes along the way, but a choreographer would most likely create a dance and then transcribe the ideas, steps and sequences, and performance details onto the standard form to be turned into the Copyright Office after it has been completed.

Yet again, this form yields similar advantages and disadvantages to the written and audio recorded dance instructions. It can be easily fulfilled by the choreographer, for it can be made available in hard copy at various locations or in electronic copy on the Copyright Office website. And because of this, it is stable and permanent, assuming the physical and electronic copies are saved and submitted to the Copyright Office. And, just as the written step by step instructions and the audio recording, it still may not convey the dance as well as a visual representation.

But, unlike the other proposed forms, this form of fixation has an additional advantage. This form may aid the efforts of the Copyright Office in standardizing copyright submissions and minimizing copyright infringement litigation. By requiring all choreographers to submit a standardized form to the Copyright Office, it is the

¹⁵⁰ See Proposed Example Form, Appendix I.

choreographer's prerogative to be as creative and thoughtful in filling it out the form when seeking legal protection of his piece. It also levels the playing field for all choreographers, so that those who do not have the financial capacity to access high-tech filming equipment or notation programs can still create equal legal protection for their pieces. This would come at little or no expense to the choreographer because they would only be subject to the thirty five dollar copyright submission fee charged by the Copyright Office.¹⁵¹ Although it is important to note that this fee may increase slightly in order for the Copyright Office to make these forms available to the public. But, this would still be considerably lower than the cost of the filming or notation.

D. Dance Community Usage

All three of the above proposed forms of fixation align with the customs of the dance community because choreographers will be able to efficiently convey their works to the Copyright Office for protection with little to no expense. Each form can be easily integrated into the choreographer's routine for creating a dance. In essence, these forms will force the choreographer incorporate fixation into the stages of creation, yet allow him to easily edit the final product before submitting it to the Copyright Office for protection. These forms may not replace the inherent self regulation system in the dance community, but they will enhance opportunity for protection by offering choreographers flexibility in fulfilling the fixation requirement. Because these forms are efficient, yet cost effective, they provide incentive for choreographers to use them to protect their work.

¹⁵¹ U.S. Copyright Office, *Fees*, <http://www.copyright.gov/docs/fees.html> (last visited November 10, 2009).

Thus, choreographers should submit any or all of these forms with their applications for copyright protection. Or, a choreographer may choose the form that best fits his needs, although combining the forms would ensure broader protection. The choreographer may either replace or supplement the existing forms of fixation with the proposed forms as he desires. In essence, these additional options are meant to increase flexibility in fulfilling the fixation requirement while aligning the legal community's interests in providing copyright protection with those of the dance community in protecting its works. The dance community would additionally benefit from the broader legal protection, which would deter infringers outside the dance community, who would not be effected by the self regulation.

Critics of these additional forms of fixation may be concerned with the lack of a visual component being submitted to the Copyright Office for copyright protection. For, one of the main concerns of the dance community is that the courts are not professionals in the field of dance. Specifically, judges may not understand the underlying issues of a copyright infringement suit, even though trial counsel will present evidence to assist in such, because they lack a trained eye in dance. Thus, critics would argue that the courts would benefit from having a visual film recording so as to compare the original work with the alleged infringing work.

Generally, a visual component would be helpful in determining whether there was in fact an infringement. But, the lack of a visual component the court that it is not the performance as a whole that is copyrighted, it is simply the steps and sequences used to create the dance. And, without a visual, the courts would be forced to assess each case more carefully by taking into account the substantial similarities of the underlying

movements documented and thereby protected. The courts would not be distracted by the actual performances - including the stage blocking, costumes, and dancers' expressions - but instead focus on the steps and sequences being illegally re-performed without license. This would benefit the dance community because the courts would ascertain the underlying issues associated with copyright and choreography.

V. Conclusion

Dance is an art form that is ever evolving that has consistently proven to be a difficult form of expression to fix, which is why many issues have developed since the initiation of the Copyright Act. Dance involves innumerable steps, sequences and movements, which may not be perceptible to the untrained eye. This poses problems for the legal system in determining whether there has been an infringement. Specifically, the legal requirement of fixation is very rigid and needs to be more flexible to encompass the variations in the performance of dance.

Film and notation have been the most commonly used forms of fixation, but other forms of fixation, including written step by step dance instruction, audio recorded step by step dance instruction, and choreographer notes, have potential to become main stream. This is due to ease of use and lack of financial strain put on the choreographer. As the fixation requirement becomes more flexible and allows for more options to fulfill the requirement, the dance community will be more likely to seek protection through copyright. If the dance community begins to incorporate legal protection to its self regulatory customs, it will become the norm to seek copyright protection for all choreographic works.

And finally, as more choreographers obtain copyright protection over their work, the prevalence of infringement suits will educate the courts in the legal aspects of copyright and choreography. With more choreographers trusting and utilizing the court system to their advantage, the threat of litigation will begin to deter potential infringers. But, everything takes time, and such a shift may take years. Nevertheless, the sooner the dance community starts taking steps to legally protect its works, the sooner the benefits will be identified. For, it only takes one dance for a choreographer to become famous, and if Michael Peters had sought copyright protection for his Thriller dance, today, he may have been wealthier than the King of Pop himself.

APPENDIX I. EXAMPLE FORM

ADDENDUM TO APPLICATION FOR COPYRIGHT OF CHOREOGRAPHY

1. Idea/Theme of Work

2. Steps/Sequences Involved (attach additional sheets if necessary)

3. Additional Details of Performance
