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Can Copyright Law Perform the Perfect Fouetté?:¹ Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause

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I. INTRODUCTION

One of the most stunning sequence of moves in classical ballet technique is fouettés rond de jambe en tournant—a series of turns performed by the dancer turning “on the supporting leg while being propelled by a whipping movement of the . . . [other] leg.”² Arguably, the most famous demonstration of these turns in classical ballet choreography is the set of thirty-two fouettés in the Black Swan pas de deux³ of the classic *Swan Lake*, performed by the ballerina dancing the dual roles of Odette and Odile.⁴ To perform these turns magnificently and impeccably requires not only proper placement of the dancer’s arms,⁵ but also, fouettés must be performed in the exact same spot.⁶ Compared to turns that are meant to move the dancer

2. American Ballet Theatre—Ballet Dictionary, <http://www.abt.org/education/dictionary/index.html> (follow “Fouetté rond de jambe en tournant” hyperlink under “Ballet Dictionary”) (last visited Oct. 14, 2008) [hereinafter Ballet Dictionary]. In French, “fouetté rond de jambe en tournant” literally translates to “whipped circle of the leg turning.” *Id.* For a visual example of a series of these turns, see *id.* (follow “Fouetté rond de jambe en tournant” hyperlink under “Ballet Dictionary”); then click the logo to view the video).

3. A pas de deux is a “dance for two,” typically between the male and the female lead dancers of the ballet. Ballet Dictionary, <http://www.abt.org/education/dictionary/index.html> (follow “Pas de deux” hyperlink under “Ballet Dictionary”) (last visited Oct. 14, 2008).

4. Wanda Farah, *The Thirty-Two Fouettés in the Coda of The Black Swan Pas de Deux*, 5 DANCE CHRONICLE 305, 306 (1982) (“Probably there is no passage of choreography in the literature of dance that is better known than Odile’s thirty-two fouettés, at least in the sense that a good part of an audience hearing the opening vamp of the coda is aware that a question exists as to how the ballerina will handle the spot where the first Odile did the first thirty-two fouettés.”). For a video clip of these spectacular thirty-two fouettés from *Swan Lake*, see YouTube—Gillian Murphy—Swan Lake—Black Swan, <http://www.youtube.com/watch?v=bOde0P7K0HM&feature=related> (last visited Oct. 14, 2008). *Swan Lake* tells the story of a young prince, Siegfried, who encounters a swan while on a hunting expedition. ANNABEL THOMAS, BALLETS: AN USBORNE GUIDE 42 (1986). The swan is really a woman, Odette, who has been turned into a white swan under a spell, which can be undone only if a man falls in love with her. *Id.* The man who cast the spell tries to confuse Siegfried with Odile, who is disguised as Odette. *Id.* As Siegfried pledges his love to Odile, he sees Odette and learns of his mistake. *Id.* The roles of Odette and Odile are almost always performed by the same ballerina. Leanne Benjamin, a principal dancer with The Royal Ballet, notes that to dance the roles of Odette and Odile, the dancer must portray two different characters:

And for one it takes a lot of . . . slow strength and stability . . . and you have to be very, very controlled and what we say in ballet terms, very “on your legs,” which basically means being as much as possible on balance But for the third act of *Swan Lake*, you have to come out being a completely different person, you have to be a lot more . . . seductive . . . and very in control of a different sort of technique, which is more bravura than the second act, that would be about really doing as many pirouettes as you can. It takes a lot more stamina to get through the third act, it’s very fast, very technical, very demanding.

Video interview with Leanne Benjamin, Principal Dancer, The Royal Ballet, available at http://www.rohedswanlake.org.uk/pgs/main/video_play.asp?id=4&Qid=209.

5. GRETCHEN WARD WARREN, CLASSICAL BALLETS TECHNIQUE 179 (1989) (“The correct coordination of the arms in turns is essential for producing the momentum that keeps a turn going.”).

6. Farah, *supra* note 4, at 308.

across the stage, “a perfect fouetté . . . is not supposed to travel at all: after fouetté number 1, number 2, number 3, and so on, not only should you see no apparent movement, but you should be conscious that the ballerina has not moved from the spot she started from.”⁷

The unintended execution of “traveling” fouettés ultimately detracts from the brilliance of the step and the effectiveness of the choreography as a whole.⁸ If these turns are completed in any manner short of perfection, the ballerina appears unprepared and unpolished, and the impact of the story suffers.⁹

Dance has played a significant role in cultures and societies for centuries. It has manifested itself in forms ranging from the classical ballets of 17th century France,¹⁰ to the exciting tap rhythms of Fred Astaire and Gene Kelly,¹¹ to today’s forms of ballroom dance on television shows, such as *Dancing With the Stars*.¹² However, only recently has American society recognized dance as an art form worthy of protection.¹³ Congress has the power to protect and encourage any art deemed valuable to the public through the Copyright Clause.¹⁴ Accordingly, Congress consistently

7. *Id.*

8. *See id.* at 309 (noting that few steps other than the thirty-two fouetté turns in the Black Swan pas de deux can match the boldness that the underlying story calls for at the moment they are performed). The thirty-two fouetté turns of the Black Swan pas de deux are not only a glorious display of artistry, but they also advance the story of *Swan Lake*. In her study of the importance of these magnificent turns to the story of *Swan Lake*, Wanda Farah observes:

When Siegfried makes his fatal mistake, he does so not only because he fails to see Odile for what she really is—not Odette—but because he has fallen under the spell of her brilliance and vivacity as well. . . . We are to have no trouble in understanding why someone might get carried away at that moment; we too should see her as dazzling at that moment. What we want at this point is something so brilliant and dazzling that black might actually be taken for white. Thirty-two . . . [ordinary] turns . . . will not suffice.

Id.

9. *See, e.g., supra* note 8 and accompanying text.

10. *See infra* note 95 and accompanying text (discussing the popularity of ballet in early France).

11. *See infra* note 107 (explaining the impact that Fred Astaire and Gene Kelly, among others, had on the popularity of dance in America).

12. *See infra* note 417 (explaining the nature of this television show); *see* John Rockwell, *Little Cheek to Cheek, but Lots of Vegas Flash*, N.Y. TIMES, June 15, 2005, at E5 (“Most of these contests and films . . . and television shows [featuring ballroom dancing] emphasize competition based on the flashiest moves and glitziest costumes: Las Vegas meets ice dancing.”).

13. *See infra* Part II.C (discussing the advancement of dance and choreography in America).

14. *See generally infra* notes 40–41 and accompanying text (discussing the inclusion of the Copyright Clause in the United States Constitution); *see infra* notes 42–46, 56–59 and accompanying text (discussing the constitutional rationales of copyright law and the view of dance and choreography as undeserving of copyright protection). One reason that Congress has proceeded cautiously with this power is because the granting of copyrights removes the protected material from

bestowed economic rewards and protection upon the authors of books, music, films, and other media that were thought to benefit society, but choreography's value to the public was repeatedly ignored.¹⁵ As the presence and prominence of dance in American culture increased from the 1950s to 1970s,¹⁶ however, Congress finally recognized the art's merits and extended copyright protection to choreographic works with the Copyright Act of 1976 (the 1976 Act).¹⁷

While the enactment of the 1976 Act was an important step for both choreographers and dancers, this legislation has been the subject of much debate since its initial passage.¹⁸ Critics argue that Congress granted choreographers an essentially useless protection, as many creators have been unable to seek copyrights due to the associated financial and artistic costs.¹⁹ Consequently, commentators have proposed a host of solutions, suggesting that the financial costs of obtaining copyrights should be adjusted,²⁰ that the Copyright Office's definition of "choreographic works" should be modified,²¹ and even that copyright protection should be focused more on artistic rights than economic rewards.²² The message of the critics is that it is too difficult for choreographers to obtain protection for their creations and that copyright law should be amended to meet the interests of these artists.²³

the public domain, rendering it unusable by others. *See infra* notes 128–35 and accompanying text (explaining the public domain in copyright law).

15. *See infra* notes 47–54 and accompanying text (discussing copyright protection under the Copyright Act of 1909). Dance historian Walter Terry comments: "To a few Americans, the art of dance is a necessity; to an increasing number, it is as important and as stimulating as the arts of music, drama, literature, or painting; and to millions, it is a new and exciting form of entertainment." WALTER TERRY, *THE DANCE IN AMERICA* 4 (rev. ed., Da Capo Press 1981). This demonstrates the point that American society has never truly looked upon dance with much regard, causing dance to often be viewed as a "second-class" art. *See infra* note 117.

16. *See infra* notes 109–17 and accompanying text (discussing the rise of choreography and dance in America during the "dance boom" of the 1960s and 1970s).

17. *See infra* Part III.B (explaining the explicit inclusion of choreographic works in the Copyright Act of 1976).

18. *See infra* Part IV.C (examining the criticisms of American copyright law among legal scholars).

19. *See, e.g., infra* Part III.B.3 (discussing the high costs and disadvantages associated with meeting the fixation requirement of copyright law); *see also infra* Part IV.C (explaining the criticisms of the current copyright protections for choreography).

20. *See infra* notes 302–07 and accompanying text (presenting the main criticisms of the fixation requirement).

21. *See infra* notes 298–300 and accompanying text (offering an overview of the dissatisfaction with the current definition of "choreographic works" among legal scholars).

22. *See infra* notes 308–10 and accompanying text (discussing the argument that copyright law should include greater protections for artistic rights).

23. *See generally infra* Part IV.C (explaining the arguments of the critics of the 1976 Act and its protection of choreography).

Just like performing the perfect fouetté turns, the success of copyright law is dependent upon balance and staying in the same place.²⁴ The law functions to protect the economic value of artists' creations and to persuade artists to continue creating works that are beneficial to society.²⁵ As a foundational principle, copyright law must maintain a balance between rewarding artists with protection and over-granting copyrights to the point that too much material is protected and rendered "off-limits,"²⁶ leaving artists uninspired or unable to create.²⁷ A ballerina who attempts to perform fouettés without properly supporting her arms or "spotting" her head²⁸ loses her focus and has no hope of completing each revolution in the same place. Her balance will be thrown off and those potentially perfect fouettés will be compromised. Similarly, amendments to the current legal framework to specifically accommodate the interests of choreographers will interfere with the law's focus and throw off its balance, rendering the law incapable of achieving the dual purposes of the Copyright Clause.²⁹ Thus, copyright legislation should not be altered to make it easier for choreographers to obtain copyright protection. To continue performing perfect fouettés, copyright law must remain in the same place, turning and inspiring choreographers to continue creating beautiful dances.

Part II of this Comment provides an overview of the historical and constitutional purposes of copyright law and examines the law's efforts to protect choreography prior to the 1976 Act.³⁰ Part II also discusses the rise of dance in America and observes the ways in which choreographers protected their creations prior to the extension of copyright law to "choreographic works."³¹ Part III explains copyright law, concentrating on

24. See *infra* notes 42–46 and accompanying text (discussing the constitutional underpinnings of copyright law and the importance of maintaining balance in the law).

25. See *infra* notes 42–46 and accompanying text (explaining the purposes of copyright protection).

26. See *infra* notes 128–35 and accompanying text (discussing the notion of the public domain and its role in maintaining the balance of copyright law).

27. See *infra* note 44 and accompanying text (discussing the basic principle that copyright law must always be balanced to be effective).

28. "Spotting" the head is a technique used by dancers to avoid getting dizzy while completing turns. WARREN, *supra* note 5, at 38. "Spotting" is accomplished by the dancer "[f]ocusing the eyes on a point in space . . . [and] whip[ping] the head around quickly in order to re-focus the eyes on this point at the completion of each turn. Focusing and re-focusing the eyes prevents the room from 'spinning' and enables the dancer to maintain vertical stability . . ." *Id.*

29. See *infra* notes 42–46 and accompanying text (describing the purposes of copyright protection in American law and society).

30. See *infra* notes 37–123 and accompanying text.

31. See *infra* notes 91–123 and accompanying text.

the 1976 Act and its particular application to choreography.³² Part IV begins by discussing why choreographers were slow to utilize the extension of copyright protection and then presents critics' suggestions to make copyright protection more appealing to choreographers.³³ Part V assesses the merit of these proposals with regard to the principles of the Copyright Clause and proposes alternative solutions to this issue beyond simply amending copyright legislation.³⁴ Part VI concludes by reasserting the need to maintain the proper balance in copyright law by preserving the current legal framework.³⁵

II. THE HISTORICAL DEVELOPMENT OF COPYRIGHT LAW AND CHOREOGRAPHY IN AMERICA

A. *Bringing Copyright Protection to America: The Copyright Clause*

Like most of this nation's guiding principles, modern day copyright law has its foundations in European law and society.³⁶ As a means of combating the spread of revolutionary ideas during the Reformation, the British monarchy in 1557 granted to the Stationers' Company—a group of printers—exclusive rights over the printing and distribution of written works.³⁷ Parliament then altered the sharply regulated landscape of printing by passing the Statute of Anne in 1710, which “knocked the legs out from under the Stationers' Company by introducing the author into British copyright law.”³⁸ Following the American Revolution, as the new American

32. See *infra* notes 124–256 and accompanying text.

33. See *infra* notes 257–310 and accompanying text.

34. See *infra* notes 312–424 and accompanying text.

35. See *infra* notes 426–32 and accompanying text.

36. See generally Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY FROM BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY 4, 4–10 (1999).

37. *Id.* at 4–5. This action by the monarchy was motivated by the desire to exert “enormous, centralized authority over expressive works for the purpose of suppressing dissent against Church or State” *Id.* at 4. This placed a great deal of control within the hands of the Stationers' Company, and the group began “to search and seize seditious and heretical works, and to imprison and fine violators without a trial.” *Id.* at 6 (footnote omitted). The authority of the Stationers' Company was tempered somewhat by the requirement that the Church or Parliament review materials prior to being printed, but nevertheless, those who belonged to the group and “who received rights to print, owned monopolies over the work or the category of works.” *Id.* (footnote omitted).

38. *Id.* at 7. The limitation of the rights of the Stationers' Company was a pivotal turning point in copyright law because, as Professor Hamilton notes, the Statute of Anne released writers from the command of the printers. *Id.* Despite the fact that authors were still required to follow anti-blasphemy laws that were in place, the Statute of Anne “took a meaningful step toward decentralized control over copyrighted original works, and it curtailed the practical ability of the government to censor which works would be published. These two steps taken together eased the way for a greater mix of printed works in the marketplace.” *Id.*

citizens began to frame their government, they looked to the Statute of Anne for inspiration.³⁹ Thus, Article I, Section 8 of the United States Constitution provides: “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁰ As such, Congress adopted the Copyright Act of 1790, providing for the first vestiges of copyright protection in the United States.⁴¹

The Copyright Clause serves the primary purpose of granting authors and artists control over their creations in exchange for their efforts of creating written and artistic works for the benefit of society.⁴² Although this grant of exclusive control effectively provides authors with monopolies over their products, which are customarily prohibited, such monopolies are permissible because of the time restrictions placed on copyrights.⁴³ Thus,

39. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 385 (rev. 4th ed. 2007); see also Hamilton, *supra* note 36, at 11 (arguing that the Statute of Anne was influential on the Founders because it gave control to authors, “not for their personal characteristics, their labor, or their relationship to the work, but rather because, out of the available choices, they are the least likely to wield tyrannical power”).

40. U.S. CONST. art. I, § 8, cl. 8; see also Hamilton, *supra* note 36, at 8.

41. MERGES ET AL., *supra* note 39, at 386. The Statute of Anne was also a tremendous influence on the 1790 Copyright Act, as “[t]hat Act, like the Statute of Anne, granted authors protection for books, maps, and charts for 14 years, and allowed renewal for a second 14-year term. . . . [and] allowed copyrights to be registered with the local district court and notice to be published in local newspapers.” *Id.*

42. *Id.* at 391. Another popular philosophy that rationalizes the existence of copyright protection is founded on the principle that people should be entitled to own the things that they work to create—the idea “that people are entitled to the fruits of their labor.” Edwin C. Hettinger, *Justifying Intellectual Property*, in *INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS* 17, 21 (Adam D. Moore ed., 1997). Hettinger notes, however, that the argument that copyrights are essential to the encouragement of creation is “[t]he strongest and most widely appealed to justification for intellectual property . . .” *Id.* at 30.

43. EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 241–42 (2002). Professor Walterscheid observes that although copyright laws do not expressly use the word “monopoly,” “the ‘exclusive’ or ‘sole’ rights granted by these statutes would rather quickly come to be referred to as monopoly rights.” *Id.* at 241. Monopoly power is not explicitly outlawed by the Constitution, but because the Constitution does not provide Congress with the express power to create monopolies, the Founders “deemed it necessary to expressly grant Congress authority in the intellectual property clause with regard to patents and copyrights. They clearly viewed these limited-term grants as monopolies, albeit of a desirable and acceptable type.” *Id.* at 241–42 (footnote omitted). Professor Merges reiterates this concept, citing to Justice Stevens’s opinion in *Sony Corp. of America v. Universal City Studios, Inc.*: “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.” MERGES ET AL., *supra* note 39, at 391 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). Thus, copyrights are granted for a limited time to ensure “that copyright protection does not unduly burden other creators or free

copyright law is focused on advancing society as a whole, rather than individual authors and creators, as it seeks to strike an important “balance between fostering incentives for the creation of literary and artistic works and the optimal use and dissemination of such works” in the public domain.⁴⁴ This rationale can be sharply contrasted with the “author’s right,” or “moral rights,” perspective, most common to international copyright legislation.⁴⁵ While American copyright law functions for the benefit of the public by encouraging artists to create, copyright law in the author’s right tradition seeks to protect the artist, rather than the consumer.⁴⁶

American copyright law’s commitment to encouraging creation for the benefit of society continued over the years, as the law was repeatedly amended to include protection for new works and creations. An important revision of the law since its initial passage in 1790 was the Copyright Act of 1909,⁴⁷ which extended copyright protection to works not previously covered by the prior law, “includ[ing] ‘all writings,’ reaching works in

expression, that works are widely disseminated, and that the next generation of authors can make use of ideas in creating still more works.” MERGES ET AL., *supra* note 39, at 391.

44. *Id.* Currently, copyrights are granted for a period of the life of the author, plus an additional seventy years. See *infra* note 202. In his explanation of the rationale behind American copyright law, Professor Merges cites to Justice Stewart’s opinion in *Twentieth Century Music Corp. v. Aiken* as instructive:

The limited scope of the copyright holder’s statutory monopoly, like the limited duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

MERGES ET AL., *supra* note 39, at 390 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (footnote omitted)). Legal scholar Joi Lakes also describes this foundational principle of copyright law as such: “Because granting property rights to choreographers and maintaining the public domain are both so intimately connected with the constitutional goals of progress and innovation within copyrightable subject matter, a balance must be created between the two. Without this balance, innovation will be curtailed.” Joi Michelle Lakes, *A Pas de Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1840 (2005).

45. See generally PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 3–4 (2001) (offering an overview of the divergent theories of copyright law in the United States and in continental Europe).

46. *Id.* (noting that the author’s right tradition “is rooted in the philosophy of natural rights: an author is entitled to protection of his work as a matter of right and justice” (footnote omitted)). Many European countries “provide more rigorous moral rights protection than common law systems, with their reputed utilitarian bent.” *Id.* at 283–84. But this is not to say that American copyright law does not offer *any* protections for authors’ moral rights. American copyright law has integrated some of these rights more recently, namely the right of paternity and the right of integrity, in a limited way as a condition of becoming a party to the Berne Convention. *Id.* at 284; MERGES ET AL., *supra* note 39, at 519; see discussion *infra* Part III.C.3 (discussing the adoption of certain moral rights in American copyright legislation and America’s joining of the Berne Convention).

47. MERGES ET AL., *supra* note 39, at 386. Copyright law underwent another major revision with the passage of the Copyright Act of 1976, which finally granted copyright protection to choreography. See discussion *infra* Part III.B.

progress, and speeches”⁴⁸ The Act also permitted the copyrighting of pictures, maps, and “dramatic or dramatico-musical compositions.”⁴⁹ Notably absent from the Act’s list of protectable works, however, was choreography, which could be copyrighted at that time only if it conveyed a story,⁵⁰ thus qualifying as a “dramatic or dramatico-musical composition.”⁵¹ This offered a loophole for some forms of choreography, such as the famous example of choreographer Hanya Holm, who received copyright protection in 1952 for her dances in the musical *Kiss Me, Kate*, protected as a dramatico-musical composition.⁵² More abstract⁵³ forms of choreography,

48. MERGES ET AL., *supra* note 39, at 386.

49. Copyright Act of 1909, § 5 (1909) (current version at 17 U.S.C. § 102 (2000)), available at <http://www.copyright.gov/history/1909act.pdf>.

50. In her account of the struggle between copyright law and choreography, Leslie Erin Wallis defines a “story ballet” as “one with a definite plot line, such as Stravinsky’s *Petrouchka* or Tchaikovsky’s *Sleeping Beauty*.” Leslie Erin Wallis, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1449 n.51 (1986). Many of the ballets created during the Romantic period of ballet similarly had a discernable story, usually relating to “the romantic involvement (usually with tragic results) of an earthly male hero and an unearthly, supernatural female heroine (i.e., the struggle between flesh and spirit).” WARREN, *supra* note 5, at 381. Krystina Lopez de Quintana reiterates this point, explaining that Romantic ballets, such as *Swan Lake*, *La Sylphide*, and *Giselle*, “debut[ed] sophisticated storylines about love, supernatural beings, femininity, and exotic places.” Krystina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies Over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 141–42 (2004).

51. Adaline J. Hilgard, *Can Choreography and Copyright Waltz Together in the Wake of Horgan v. Macmillan, Inc.?*, 27 U.C. DAVIS L. REV. 757, 762–63 (1994) (noting that to gain protection under the 1909 Act, “choreographers’ works had to be ‘dramatic’ or ‘dramatico-musical’ compositions . . . [and thus] had to tell a story, be a part of a dramatic work, or convey a dramatic idea” (footnotes omitted)).

52. Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 275 (1999). Journalist Jack Anderson suggests, however, that this historical moment may also be attributable to the fact that Holm’s choreography was notated, and thereby preserved in a more permanent form. Jack Anderson, *Putting Dances in a Safe Place*, N.Y. TIMES, Aug. 1, 1993, at H27. Holm asked Ann Hutchinson Guest to notate the choreography, as Guest was both a dancer and a student of notation, often notating choreography at her leisure. *Id.* Although Guest was not a dancer in the original cast of *Kiss Me, Kate*, she was once asked to fill in for a dancer who was unable to perform in a performance of the show, and Guest learned the part by studying the notation that she had created. *Id.* For a further discussion of various notation forms and their respective advantages and disadvantages, see discussion *infra* Part III.B.3.

53. The late George Balanchine was a choreographer known for often creating “abstract” choreography. BERNARD TAPER, *BALANCHINE: A BIOGRAPHY* 249 (1984). Taper notes that Balanchine thought the word “abstract” to be “a misnomer, since he was not trying to present any abstractions and since he did not see how anything performed by living human beings could be called ‘abstract.’ He preferred to call them ‘plotless’ ballets.” *Id.* However, it is arguable that Balanchine’s abstract choreography failed to convey some kind of message, as Taper observes: “Plotless or not, there was always drama in them, and an often surprising range of emotion, as well as a distinctive attitude or outlook.” *Id.*

however, “could only be copyrighted in the form of either a ‘book’ or a ‘motion picture,’” and faced an uphill battle in gaining copyright protection outright.⁵⁴

The continued resistance to protecting choreography through copyright law has historically been attributed to three factors.⁵⁵ First, the Copyright Clause permits Congress to grant copyright protection to those arts that are deemed beneficial to the public, and Congress did not view choreography as serving any valuable purpose during the first half of the twentieth century.⁵⁶ Based on the notion that copyright law should provide the public with some benefit, Congress’s viewpoint may have been influenced by the lack of popularity of ballet and dance in American society during this time.⁵⁷ Classical ballet had nothing even resembling a following of supporters, as Bernard Taper recounts:

Famous ballet stars and their troupes . . . had made American tours or given performances in this or that large American city, with varying degrees of acclaim, during the past twenty years; but there was no settled tradition of ballet in the United States, no significant standard of reference. People who had never seen ballet naturally did not feel that they were missing anything, while among its devotees the snobbish conception prevailed that Americans could never master ballet techniques and simply did not have the “soul” for ballet.⁵⁸

54. Swack, *supra* note 52, at 274. Balanchine tried to gain copyright protection in 1953 for *Symphony in C*, a ballet of abstract choreography, which, of course, did not qualify for protection due to its abstract nature. *Id.* at 275. Later, in 1961, Balanchine made a second attempt to copyright *Symphony in C*, submitting it as a motion picture, which was successfully accepted by the Copyright Office. *Id.*

55. See generally *id.* at 273–74 (discussing three reasons why choreography did not qualify for copyright protection for decades); 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, 42–43 (2004) (outlining three explanations for the lack of copyright protection for choreography); Hilgard, *supra* note 51, at 761–64 (discussing the reasons for Congress’s failure to extend copyright protection to choreography).

56. Swack, *supra* note 52, at 273; see also Abitabile & Picerno, *supra* note 55, at 42.

57. TAPER, *supra* note 53, at 152.

58. *Id.* Such conditions did not improve in the years following the Copyright Act of 1909. America was hit with the Great Depression in the 1930s, which did not make society an open stage for as

exotic, costly, aristocratic, and useless an amusement as ballet. The arts were expected—according to the dominant critical and intellectual attitude of the Depression period—to be committed to the social struggle, to portray reality in all its harshness, or at least to be earthy and “of the people.” Classical ballet certainly did not meet any of those conditions.

Id. For a further discussion of the rise of classical ballet both in Europe and in the United States, see discussion *infra* Part II.C.

Thus, Congress had no incentive to protect choreography by copyright and encourage its creation because American society seemed to find it no more important than Congress did in 1909.⁵⁹ Second, as previously mentioned, in order to obtain copyright protection, choreography needed to have some kind of plot, which barred the copyrighting of abstract choreography.⁶⁰ Finally, Congress failed to extend copyright protection to abstract choreography because of its own confusion over the definition of abstract choreography.⁶¹ Congress was not alone in its confusion, as “choreography” was a word relatively unknown to common vernacular in the early decades of the twentieth century.⁶² As a result of these contributing factors, abstract choreography remained unprotected by copyright until 1976.⁶³

59. Swack, *supra* note 52, at 273.

60. *Id.* at 273–74; see also discussion *supra* note 50 and accompanying text (discussing the concept of the “story” ballet). Cf. JACK ANDERSON, *Confessions of a Choreography-Watcher*, in CHOREOGRAPHY OBSERVED 4, 7 (1987) (arguing that even abstract dances are “in no way devoid of significance. . . . [S]ince all are performed by human beings, they contain images of men and women in harmony and conflict. Because they present us with visions of chaos or design, many fine abstract dances seems to possess moral, social, and even spiritual significance. Because we can respond to the changing degrees of tension and relaxation in the steps of a dance, . . . every little movement may very well convey a meaning of its own.”). Choreographer Doris Humphrey argued that stories and plots may even be irrelevant to the viewer, noting that “The Dying Swan” variation from *Swan Lake*, “as performed originally by Anna Pavlova, . . . moved countless audiences to tears and remains the supreme example of romantic tragedy in dance. It is certainly not because of the actual subject. Who could care seriously about a swan, alive or dying?” DORIS HUMPHREY, *THE ART OF MAKING DANCES* 26 (1987). Even if a particular dance lacks an underlying plot or story, there is almost always some reason why the dancer makes a certain movement, which creates its own story, in a way. *Id.* at 110. Humphrey explained this concept as such:

A movement without a motivation is unthinkable. Some force is the cause for change of position, whether it is understandable or not. This applies not just to dancing, but to the physical world in general. Choreographers can and do ignore motivation . . . but try as they may to be abstract, they cannot avoid saying, “I live, therefore I move!”

Id.

61. Abitabile & Picerno, *supra* note 55, at 42.

62. TAPER, *supra* note 53, at 180. In his biography of George Balanchine, Taper recounts Balanchine’s own efforts in bringing the word “choreography” into American use. *Id.* When Balanchine choreographed the dances for the 1936 musical *On Your Toes*, he requested that his work might be attributed by “read[ing] ‘Choreography by George Balanchine.’” *Id.* Prior to this time, “the playbill credit line for the dancers in musicals had always read, ‘Dances by --.’” *Id.* Since “choreography” remained “an unfamiliar word in the United States in 1936, . . . [the producer of the show] feared the public would not know what it meant. Balanchine replied that maybe it would intrigue the public to see a new word, and . . . [the producer] agreed to make the experiment.” *Id.*

63. Abitabile & Picerno, *supra* note 55, at 43; Swack, *supra* note 52, at 274; see discussion *infra* Part III.B (discussing the changes ushered in by the 1976 Copyright Act).

B. *Dancing with Myself*.⁶⁴ *The Traditional Protections of Choreography*

Choreographing a dance is by no means a simple process. Nor is it an endeavor that can be replicated by following a set “formula,” as each choreographer has his or her own approach to the creative process.⁶⁵ For most, however, choreography is inspired by a particular theme,⁶⁶ or a specific piece of music⁶⁷ that the choreographer intends to use in his or her piece.⁶⁸ From there, the paths diverge and choreographers approach the task in a number of different ways.⁶⁹ For example, the late George Balanchine, one of the world’s preeminent choreographers,⁷⁰ choreographed almost entirely during rehearsals, rather than preparing extensively prior to working with his dancers.⁷¹ Regardless of the initial path that each choreographer

64. BILLY IDOL, *Dancing With Myself*, on DON’T STOP—EP (Chrysalis Records 1981).

65. Lopez de Quintana, *supra* note 50, at 145–46 (describing the creation of choreography as “unique” to each person and noting that “[t]here is no specified form a choreographer must follow”).

66. For instance, the theme of Balanchine’s ballet *The Four Temperaments* is derived from the thought “that human beings are made up of four different humors that determine a person’s temperament. Each . . . was associated with one of . . . four classical elements (earth, air, water, and fire) which in turn were the basis of the four humors (black bile, blood, phlegm, and bile) that composed the body.” New York City Ballet, Repertory Index, <http://www.nycballet.com/company/rep.html?rep=79> (last visited Oct. 14, 2008).

67. Lopez de Quintana, *supra* note 50, at 145 n.42. One example of the development of a ballet based on a particular music choice is Balanchine’s famous ballet *Stars and Stripes*, set to several of the marches of composer John Phillip Sousa. New York City Ballet, Repertory Index, <http://www.nycballet.com/company/rep.html?rep=177> (last visited Oct. 14, 2008). Balanchine was once “asked why he chose to choreograph a ballet to Sousa’s marches, . . . [and he] replied: ‘Because I like his music.’” *Id.* In fact, the music was typically the starting point for Balanchine when he began choreographing his dances. TAPER, *supra* note 53, at 11–13. Balanchine’s father was a composer and Balanchine himself received formal music training prior to focusing solely on dance. *Id.* at 11. Thus, his “advance preparations . . . would have consisted chiefly in studying the music . . . , [then] he would decide what dance quality was best suited to it—what palette of movement it called for—settle on the size of the ensemble of dancers he would use, and determine who his principal soloists would be.” *Id.* at 11–13. For some choreographers, the music may not only be the inspiration for the piece, but it also may be the dance’s theme. An example of this concept is evident in the 2000 feature film *Center Stage*, chronicling the struggles of several students at a prestigious ballet company’s school. In one scene, the artistic director of the company is choreographing a piece on students for a workshop, and when asked by one student what the dance is about, he replies, “The music. The music. It’s an expression of harmony . . . that isn’t of this world.” CENTER STAGE (Columbia Pictures 2000).

68. Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives v. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 292 (1984) (“The choreographer usually begins with an inspiration derived from an intriguing story, musical composition, or vague mental image of movement.”).

69. See *supra* notes 65–72 and accompanying text (discussing the uniqueness of the choreographic process).

70. For further information on the life and influence of George Balanchine, see *infra* notes 102–07 and accompanying text.

71. TAPER, *supra* note 53, at 4. On his methods of choreographing, Balanchine said: “I’m not one of those people who can create in the abstract, in some nice quiet room at home If I didn’t have a studio to go to, with dancers waiting for me to give them

follows, all invest countless hours and creativity into the making of a production that merits some type of protection for their efforts.⁷²

Lacking legal protection for their dances, choreographers of abstract pieces relied heavily on the traditional protections of their own community to safeguard their creations.⁷³ Drawing up their own methods for protecting their creations made a great deal of sense, particularly since the dance community was, and in some respects remains, “a close-knit, protective community.”⁷⁴ As such, one of the most important customs enforced was

something to do, I would forget I was a choreographer. I need to have real, living bodies to look at. I see how this one can stretch and that one can jump and another can turn, and then I begin to get a few ideas.”

Id. Another notable example is the process employed by modern dance choreographer Merce Cunningham. Lakes, *supra* note 44, at 1855. Cunningham relies on computer programs as a means of creating and fixating his choreography. *Id.* Through this process, Cunningham first choreographs his steps on the computer and then the dancers rely on the computer program to learn the choreography. *Id.* Not only is this a unique way of choreographing steps, but also, computers provide a new way of notating choreography, thereby enhancing its preservation and making it easier to obtain copyright protection. *Id.*; see also discussion *infra* Part III.B.3 (discussing the necessity of fixation and the various modes available to meet the fixation standards under copyright requirements).

72. Katie Lula, *The Pas de Deux Between Dance and Law: Tossing Copyright Law into the Wings and Bringing Dance Custom Centerstage*, 5 CHI.-KENT J. INTELL. PROP. 177, 179 (2006) (arguing that “choreographers should take strides to preserve their culture, and should do so by gaining legal recognition and copyright protection for their dances”). Jack Anderson summed up this point by commenting,

What makes a ballet a classic, anyway? Surely not the story. Many balletic scenarios derive from folklore or literature. There is nothing brilliantly original about their plots. Nor does music necessarily make a ballet a classic. . . . [S]ome well-regarded ballets have music by less than first-rate composers. What made those ballets important was choreography.

Jack Anderson, *A Ballet Classic Isn't Always What It Used to Be*, N.Y. TIMES, Aug. 25, 2002, at A8.

73. Singer, *supra* note 68, at 291–96, 318–19 (examining the traditional safeguards for choreography in the dance community and arguing that these customs protect choreography more successfully than statutory law); Lakes, *supra* note 44, at 1832–35 (offering an overview of customary protections of choreography practiced by choreographers); see generally Lauren B. Cramer, *Copyright Protection For Choreography: Can It Ever Be “En Pointe”? Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography*, 1 SYRACUSE J. LEGIS. & POL. 145, 154–59 (1995) (discussing the general non-legal practices used by choreographers to protect their works); Lopez de Quintana, *supra* note 50, at 161–64 (discussing the prevailing customs applied among choreographers and dancers to protect choreography); Lula, *supra* note 72, at 187–89 (discussing choreographers’ own methods for guarding their creations prior to the existence of formal statutory law); Edwina M. Watkins, *May I Have This Dance?: Establishing a Liability Standard for Infringement of Choreographic Works*, 10 J. INTELL. PROP. L. 437, 442–47 (2003) (outlining the means by which choreographers protected their works prior to the passage of statutory law).

74. Singer, *supra* note 68, at 291. Professor Singer credits this small community to the fact that there are “relatively few artists willing to commit themselves to the dance.” *Id.*

the notion of choreographic credit, in which any performance of choreography was attributed to the original choreographer.⁷⁵ Furthermore, choreographers often relied on contract law principles to protect their choreography, by entering into licensing contracts with others who wished to stage and to perform particular dances.⁷⁶ These agreements also provided choreographers with the authority to assess the capacities and qualities of the dancers who would be performing their works, to ensure “that the skills of the company reflect[ed] the artistic worth of the composition.”⁷⁷ Thus, such contracts permitted choreographers to maintain artistic control over their works.⁷⁸ Consequently, the application of these traditional protections allowed choreographers to guard their creations when the law could not, and permitted the incorporation of moral rights notions into this protection—a concept that later legislation continually rejected.⁷⁹

75. *Id.* at 292–93. Choreographic credit remains an important custom in the dance world today. *Id.* For instance, in Andrew Lloyd Webber’s musical *The Phantom of the Opera*, Gillian Lynne continues to be credited as the show’s choreographer, even after countless productions by various groups over the twenty-one years since the show’s creation. Meet the People—Biography Gillian Lynne, http://www.thephantomoftheopera.com/London/meet_the_people/creative/gillian_lynne.php (last visited Oct. 14, 2008). Even with the progression of copyright law and its recognition of choreography as a copyrightable form, this traditional custom of choreographic credit has not been completely abandoned and remains the form of moral rights that has been integrated into the Copyright Act, particularly as the right of paternity. See *infra* Part III.C.3 (discussing the moral rights available to copyright holders under current copyright law). Choreographic credit has remained an absolute custom, even if the company performing the piece has obtained legal ownership of the choreography. Singer, *supra* note 68, at 292–93. Legal ownership of choreography has recently become a larger issue in copyright law, particularly as many famous choreographers have passed away, often leaving their choreography in limbo, such as in the case of Martha Graham. See *infra* note 151 and accompanying text (discussing the ownership of choreography following the death of Martha Graham).

76. Singer, *supra* note 68, at 293–95 (offering an overview of typical licensing contracts entered into by choreographers). Provided that the choreographer was satisfied with the company’s ability to perform his choreography, the parties entered into a licensing agreement, in which the performing company paid a fee in exchange for the right to perform the choreography for a certain number of performances. *Id.* at 294.

77. *Id.* (footnote omitted).

78. *Id.* This process embodied the traditional custom of the dance community that a choreographer has the “right to control his works, even after he has ‘released’ them to the public.” *Id.* at 293. What makes a contract such a desirable mode of protecting choreography and particularly the artistic rights of choreographers is the flexibility that a contract provides, by allowing contracting parties to write in terms that they deem important to abide by. See *id.* at 294–95. Consequently, the contract may “provide that the choreographer or his agent teach the dance and supervise a specified number of rehearsals,” or it may give the choreographer an active role in the recreation and staging of the choreography. *Id.* at 294–95 (footnotes omitted). Moreover, the choreographer can even provide himself with the absolute right to rescind the performance rights from the performing company if he finds that the company is not able to do justice to the piece. *Id.* at 295.

79. *Id.*; see *supra* notes 45–46 and accompanying text (discussing the concept of moral rights in European copyright law); see also *infra* Part III.C.3 (discussing the incorporation of certain moral rights in American copyright legislation once the United States became a party to the Berne Convention).

Another important traditional protection of choreography in the dance community has been the preservation of dances through memory.⁸⁰ Like a family ritual or story passed down through the ages, choreography was, and often continues to be, communicated by the dancers who first performed the choreographer's work and who teach the steps to future generations of performers.⁸¹ While this may seem like the perfect opportunity to adapt classic dances into new forms and update traditional choreography to suit new audiences, "companies rigorously rehearse these works in an effort to preserve the original choreographer's artistic integrity."⁸² Concededly, this may be an imperfect protection, but until choreographers engage in greater, widespread documentation of their dances,⁸³ the dance world must continue to rely on this age-old custom of preserving and protecting choreography.⁸⁴

Despite the advantages of relying on these customs to protect choreography, such safeguards did not always prevent the use of choreography without the creator's permission.⁸⁵ Often, choreographers copied the dances of others because they did not think anyone would notice minor samplings of choreography.⁸⁶ Additionally, many believed that there was nothing wrong with using only a small portion of another's

80. Lakes, *supra* note 44, at 1833.

81. Lopez de Quintana, *supra* note 50, at 163.

82. *Id.* at 164. This is not always the case, however, as many of the great ballets, originally choreographed more than a century ago, continue to be performed today in altered versions and stagings. Anderson, *supra* note 72, at A8. To cite a few examples, Anderson noted:

[T]he original version of "The Nutcracker" exists at best in shreds, and choreographers now do just about anything they please to its Tchaikovsky music. Historians regard "Coppélia" (1870) as one of the last great 19th-century French ballets. Yet today it exists in innumerable versions, many based on later Russian stagings.

Id. Despite the great importance the dance world places on choreography, Anderson argues that choreographers often engage in the "high dubious assumption" of presuming that choreography can be altered on a whim. *Id.* Anderson compares this to the similar effect that would result if the director of a Shakespearean play dared to completely alter Shakespeare's words, despite the fact that he may stage the production in a new fashion. *Id.* Over his years of watching and commenting on ballet, Anderson has poignantly observed,

Our present willingness to tolerate extensive changes in extant works may be a hangover from the old attitude that dance is not really an important art Yet in our century dance has gained enormous artistic significance, and so what is danced surely matters as much as how it is danced.

JACK ANDERSON, *Idealists, Materialists, and the Thirty-Two Fouettés*, in CHOREOGRAPHY OBSERVED 16, 26–27 (1987).

83. See discussion *infra* Part III.B.3 (discussing the various methods of recording and preservation available to choreographers today).

84. Lopez de Quintana, *supra* note 50, at 163–64.

85. Lakes, *supra* note 44, at 1833.

86. *Id.*

choreography, as “[m]any choreographers possessed a more relaxed view on borrowing from each other’s works, which resulted in what might be termed a ‘culture of sharing.’”⁸⁷ Some even considered the copying of their choreography to be an honor of sorts.⁸⁸ Furthermore, even though it was somewhat atypical for others to violate licensing contracts with choreographers, when infringement occurred, choreographers usually did not pursue legal action.⁸⁹ More often than not, choreographers preferred to let violations slide, rather than subject themselves to the costs and inconvenience of a lawsuit.⁹⁰ Thus, the dance world clearly needed stronger protections to shield its creations.

C. *Dance Grand Jétés*⁹¹ into America: The “Dance Boom”⁹² of the 1960s and 1970s

To fully understand the development of copyright protection for choreography and its ramifications, it is important to comprehend the rise of dance as a valuable art form.⁹³ While ballet is commonly associated with the art’s rich history in France, ballet first began in the Italian courts of the 15th century.⁹⁴ Ballet gained increasing popularity during the 17th century when

87. *Id.*

88. Singer, *supra* note 68, at 296. Such copying was often considered “a risk of the trade of choreography or free publicity.” *Id.* Commenting on the issues surrounding the ownership of Martha Graham’s choreography, choreographer Eliot Field stated, “‘I wish people were stealing my work left and right, and it became an enormous issue for me.’ . . . ‘The idea that any of us would share the problem that Martha’s work had engendered is presumptuous beyond belief.’” Joseph Carman, *Who Owns a Dance? It Depends on the Maker*, N.Y. TIMES, Dec. 23, 2001, at AR30. For a further discussion of the litigation relating to the ownership of Martha Graham’s copyrighted dances, see *infra* note 151.

89. Singer, *supra* note 68, at 296.

90. *Id.* Quite often, legal action would not leave the choreographer with much in the end, either because the value of their damages, such as in the form of lost profits, was not a very large sum of money, thus not making it worth the costs of suing an infringer. *Id.* Moreover, most choreographers could not afford to initiate a lawsuit even if they had wanted to, as choreographers generally operated with limited funds, which continues to be the case today. *Id.*; see *infra* notes 392–97 and accompanying text (noting the costs of running a dance company).

91. In classical ballet technique, a *jété* is a type of jump performed by the dancer and can be completed in a number of different ways, the most extravagant of which is the *grand jété*. Ballet Dictionary, <http://www.abt.org/education/dictionary/index.html> (follow “*Jété, grand*” hyperlink under “Ballet Dictionary”) (last visited Oct. 14, 2008). It is performed by brushing one leg into the air and shifting the dancer’s weight from the supporting leg to land on the brushing leg, ultimately providing the illusion of doing the splits in the air. See *id.*

92. See *infra* note 109 and accompanying text (defining the “dance boom” in the context of the rise of dance’s popularity in America).

93. See *supra* notes 56–59 and accompanying text (discussing the prior view of dance and choreography as insignificant and thus undeserving of copyright protection).

94. TERRY, *supra* note 15, at 17 (noting that although ballet was indeed performed in these courts, dancing was not the main attraction, so to speak, as “these spectacles were presented in conjunction with banquets, with celebrations of the most lavish sort”). Indeed, ballet typically took

King Louis XIV of France launched the Royal Academy of Dancing, where some of ballet's first professional dancers studied.⁹⁵ One of the most pivotal eras of classical ballet remains the Romantic Period, beginning in the 19th century, when advanced plots and themes⁹⁶ began to take shape in the choreography.⁹⁷ More importantly, ballet was revolutionized during this time, as ballerinas began dancing en pointe, or on their toes, "escaping reality . . . and, incidentally, causing a whole new technique of balletic action to be born."⁹⁸

As classical ballet continued to spread throughout the world, the most direct path leading to the arrival of classical ballet in America was via Russia.⁹⁹ The pinnacle of Russia's influence was the establishment of the Ballet Russes by the great Serge Diaghilev.¹⁰⁰ The Ballet Russes first toured the United States in 1916, but the arrival of the Russian troupe was met with

the shape of entertainment between acts of plays or operas, as opposed to the full ballets that are regularly performed today. *Id.*

95. *Id.* at 18. The great support that France paid to classical ballet was a growing trend as cities throughout Europe began to debut ballets to their own audiences. *Id.* at 19. Despite the explosion of ballet, "the Paris Opéra remained the capital of the ballet world and the French and the Italians held the major posts of command." *Id.*

96. See *supra* note 50 (discussing some of the themes and stories common to the ballets of the Romantic Period).

97. TERRY, *supra* note 15, at 19. The style of dancing and the technique of dancing en pointe were not the only changes that occurred throughout the early years of ballet. The traditional costumes worn by dancers began to change dramatically, as dancers wore tighter and less clothing, both to make it easier to perform the steps and to display delicate technique and footwork. JANICE BARRINGER & SARAH SCHLESINGER, *THE POINTE BOOK: SHOES, TRAINING & TECHNIQUE* 1–2 (rev. ed. 1998).

98. TERRY, *supra* note 15, at 19. The footwear of ballet changed dramatically throughout this period, transitioning from heeled shoes to the more functional flat, soft-soled slippers, which provided greater flexibility and "facilitated the fully extended pointing of the foot as well as jumps and turns." BARRINGER & SCHLESINGER, *supra* note 97, at 2. While many dancers began to experiment with dancing on their toes, usually limiting themselves to "briefly held poses" on their toes, ballerina Marie Taglioni provided one of the first performances of dancing en pointe in an 1832 production of the Romantic ballet *La Sylphide*. *Id.* at 3. Beyond creating a new style of classical ballet, dancing en pointe revolutionized choreography, as it became "an essential choreographic element." *Id.* George Balanchine once said about pointe work:

"Where words fail, poetry can succeed and the same is true of ballet: something you cannot explain can be expressed on pointe. You can't tell a story on pointe but it can, when imaginatively used, give you an extra feeling similar to modulations in music or color intensities in light. In this sense, the pointe, even if it cannot tell a story, communicates drama."

Id. at 6 (footnote omitted).

99. TERRY, *supra* note 15, at 20–22.

100. *Id.* at 21. Diaghilev's Ballet Russes was influential because it "united the talents of great composers, painters, librettists, choreographers, and dancers to build the most exciting theater of dance that the world had yet seen." *Id.*

lukewarm reactions by the American public.¹⁰¹ This landscape for American ballet soon changed, however, with the help of two pivotal figures: Lincoln Kirstein and George Balanchine.¹⁰² Kirstein saw the potential for ballet in America, as he “envisioned an American ballet where young native dancers could be trained and schooled under the guidance of the world’s greatest ballet masters to perform a new, modern repertory, rather than relying on touring groups of imported artists performing for American audiences.”¹⁰³ When Kirstein met Balanchine in 1933,¹⁰⁴ Balanchine agreed to help form a new American ballet on one condition: that the two would found a school to train young students.¹⁰⁵ Although Kirstein’s and Balanchine’s New York City Ballet (NYCB) got off to a rocky start,¹⁰⁶ the company flourished as American exposure to dance blossomed through theatre, film, and television,¹⁰⁷ and the nation began to form its first ballet companies.¹⁰⁸

101. *Id.* at 168; *see supra* note 58 and accompanying text.

102. TERRY, *supra* note 15, at 173.

103. Brief History—New York City Ballet, <http://www.nycballet.com/company/company.html> (follow “History” hyperlink) (last visited Oct. 9, 2008).

104. *Id.* Balanchine first left the Soviet Union in 1924, along with several other dancers, and auditioned for Diaghilev’s Ballet Russes. George Balanchine—New York City Ballet, <http://www.nycballet.com/company/company.html> (follow “History” hyperlink; then follow “George Balanchine” hyperlink) (last visited Oct. 9, 2008) [hereinafter George Balanchine]. Upon being invited to join the Ballet Russes, Balanchine took on the role of ballet master and undertook several choreographic endeavors, which led him throughout Europe until settling in America, following this historic meeting with Lincoln Kirstein. *Id.*

105. Lincoln Kirstein—New York City Ballet, <http://www.nycballet.com/company/company.html> (follow “History” hyperlink; then follow “Lincoln Kirstein” hyperlink) (last visited Oct. 9, 2008). In response to Kirstein’s invitation to join his venture in America, Balanchine replied with the now infamous words, “But, first a school.” *Id.* It is not surprising that Balanchine would have this reaction because he was “not only a great choreographer but also a sensitive teacher-director eager to apply and adapt Russian training methods to American bodies and American temperaments and eager also to create ballets for the as yet unjelled American style of ballet.” TERRY, *supra* note 15, at 173. The School of American Ballet was formed in 1934 and continues to thrive today, as a lasting testament to the work of Balanchine and Kirstein and to the history of ballet in the United States. George Balanchine, *supra* note 104.

106. The Metropolitan Opera (the Met) asked NYCB to be its resident ballet company in 1935, but this did not result in the grandeur that Kirstein and Balanchine might have expected. TAPER, *supra* note 53, at 165–66. The Met undervalued the ballet company, as the dancers were never permitted to rehearse with the orchestra, the dressing rooms were entirely inadequate, and the Met refused to reserve some performances entirely for ballet, claiming that there was not enough money to allow for balletic productions. *Id.* at 166–67. While Balanchine attempted to navigate his company around these constraints, the disrespect continued and Balanchine severed ties with the Met in 1938, saying, “‘The Met is a heap of ruins,’ . . . ‘and every night the stagehands put it together and make it look a little like opera.’” *Id.* at 175. However, because the ballet company could not operate without financial support from the Met, the company also fell apart at this time, not to re-form until 1948. *Id.* at 175, 222–27.

107. During the NYCB’s hiatus, the American public was exposed to Balanchine’s choreography and ballet via other, more popular avenues. TAPER, *supra* note 53, at 177; *see generally* TERRY, *supra* note 15, at 222–33 (discussing the importance of dance in musical theatre and films). Balanchine contributed greatly to the advancement of ballet in this form through his choreography of the Rodgers and Hart musical *On Your Toes*, as Taper notes that Balanchine added:

This rapid rise in the popularity of dance, and particularly classical ballet, led to what is commonly known as the “dance boom,”¹⁰⁹ beginning in the 1960s.¹¹⁰ It was age marked by creative choreographers who constantly pushed boundaries “and like-minded rebels whose use of nondancers and nondance movement questioned the nature of dance itself.”¹¹¹ Along with this outbreak in choreographic creativity,

[E]legance, sophistication, and range of reference . . . such as Broadway had not previously known. In addition, his dances in *On Your Toes*—particularly the memorable *Slaughter on Tenth Avenue*—were the first ever seen in a Broadway musical that were not just interludes but functioned as an essential, active aspect of the plot. This paved the way for what was done by Agnes de Mille a few years later in *Oklahoma!*

TAPER, *supra* note 53, at 179–80. Such choreographic strides opened up a new world for ballet and other forms of dance on the musical theatre stage, evidenced by Agnes de Mille’s classic “dream ballet” in Rodgers and Hammerstein’s *Oklahoma!* and Jerome Robbins’s choreography of *West Side Story*, in which “Robbins achieved total theater, for acting moved into dance and back imperceptibly . . .” TERRY, *supra* note 15, at 223–25. This trend naturally spilled over into feature films, as well, as American audiences were captured by the swift moves of Fred Astaire, and Ginger Rogers. *Id.* at 228. Beyond extending the traditional reaches of dance, Gene Kelly offered moviegoers an in-depth look at dance, as he was “[n]ot content with simply photographing dances, [but] he used the camera’s inherent mobility and almost magical perceptiveness to seek out dance details . . .” *Id.* at 228–29. Along with cinematic productions of stage musicals such as *Oklahoma!*, *West Side Story*, and *Seven Brides for Seven Brothers*, “movies fully exploited what Broadway had known for a decade: that dancing could be a part of the plot itself, a perfectly natural medium for the delineation of character, the evoking of mood, the heightening of incident.” *Id.* at 229. Moreover, television contributed to the rise of dance’s popularity by carrying the art directly into the homes of America. *Id.* at 230. Professional ballet companies performed full-length ballets for television, beginning with the Royal Ballet’s *The Sleeping Beauty* and continuing with the Emmy Award winning production of the National Ballet of Canada’s *Cinderella*. *Id.* at 233. This trend of capturing dance on film only strengthened with the production of films such as *The Turning Point*, starring Mikhail Baryshnikov, and continues today with recent films such as *Center Stage*, *Save the Last Dance*, and the hit television series *Dancing with the Stars*. See Anna Kisselgoff, *Thoughts on the Once and Future Dance Boom*, N.Y. TIMES, Jan. 6, 2005, at E1, E5; see *infra* note 417 (discussing the television show *Dancing With the Stars*).

108. See TERRY, *supra* note 15, at 177–78. The American Ballet Theatre (ABT) was formed in 1940 and remains one of the most renowned and well-known ballet companies in the world today. Inside ABT: Company History, <http://www.abt.org/insideabt/history.asp> (last visited Oct. 14, 2008).

109. The National Endowment for the Arts defines the dance boom, spanning from the 1960s to the 1980s, as a time “marked by explosive growth in the number of companies, eager audiences, domestic and foreign presenters hungry to showcase recent innovations in American dance, and an abundance of new funding opportunities at the local, state, and federal levels of government.” NAT’L ENDOWMENT FOR THE ARTS, RESEARCH DIV. REPORT NO. 44, RAISING THE BARRE: THE GEOGRAPHIC, FINANCIAL, AND ECONOMIC TRENDS OF NONPROFIT DANCE COMPANIES 2 (2003), available at <http://www.nea.gov/research/RaisingtheBarre.pdf>.

110. Kisselgoff, *supra* note 107, at E1.

111. *Id.*

[A] rarely used word, superstar, became part of the discourse when [Rudolph] Nureyev defected from the Soviet Union in 1961 and soon after formed a partnership with [Margot] Fonteyn at the Royal Ballet. Mania, not just balletomania, reigned, with visits by companies from the Bolshoi [Ballet] to the Royal [Ballet] through the 70's.¹¹²

With the rise of abstract movements and the modern dances of Martha Graham, Paul Taylor, and Merce Cunningham, dance attracted new fans, such as the counterculture generation of the 1960s.¹¹³ Dance also gained vital financial support from the government, with the establishment of the National Endowment for the Arts (NEA) in 1965.¹¹⁴ Beyond providing choreographers and dance companies with grants,¹¹⁵ the NEA launched a Dance Touring Program to assist with the costs of touring the nation and exposing new audiences to dance.¹¹⁶ It finally seemed that dance was gaining the recognition it deserved as a legitimate art, worthy of support.¹¹⁷

Against this backdrop, some choreographers began to push for a change in copyright legislation, searching for protection for their works amid dance's increased popularity.¹¹⁸ Choreographer Agnes de Mille was vocal in this struggle as she "pleaded for 'some chance to protect our basic

112. *Id.*

113. *Id.* *New York Times* columnist Anna Kisselgoff cites the example of Pilobolus, as appealing to a new subsection of dance fans in the counterculture since Pilobolus essentially functions "as a choreographic collective, [and] was the dance-world's equivalent of a commune." *Id.*

114. NAT'L ENDOWMENT FOR THE ARTS, THE NATIONAL ENDOWMENT FOR THE ARTS 1965–2000: A BRIEF CHRONOLOGY OF FEDERAL SUPPORT FOR THE ARTS 11 (rev. ed. 2000), available at <http://www.nea.gov/about/Chronology/NEAChronWeb.pdf>. The NEA was created through the National Foundation on the Arts and the Humanities Act, signed by President Lyndon B. Johnson on September 29, 1965. *Id.* From that moment, the NEA instantly took action to financially support the arts, by awarding its first grant to the American Ballet Theatre in December 1965 for \$100,000. *Id.* at 12. Following this historic event, the *New York Herald Tribune* commented that "[t]he Treasury of the United States has saved a national treasure. Not directly, perhaps, but the taxpayers, through the government's recently established National Council on the Arts, saved the American Ballet Theatre from extinction." *Id.* Many commentators maintain that this government support helped to create the "dance boom" and the success of dance in America, but Kisselgoff argues that "the artists . . . came first and that these agencies [such as the NEA] acted in response to the art form, filling a need and demand." Kisselgoff, *supra* note 107, at E1.

115. A common method of financial support from the NEA came in the form of Choreographer's Fellowships. NAT'L ENDOWMENT FOR THE ARTS, *supra* note 109, at 2. These grants were awarded to choreographers who "demonstrated talent and promise of future development." *Id.* This money could be used for any activity that qualified as "artistic development," including research and studies, but most used the funds "as small production grants to hire dancers, pay for rehearsal space and time, provide funds for costume design and construction, subsidize theater rental, and finally support performance." *Id.*

116. *Id.* at 3.

117. See Singer, *supra* note 68, at 291 (noting that "[t]he second-class status of dance has had a detrimental effect on the development of the art of choreography").

118. *Id.* at 289, 289 n.9.

rights.”¹¹⁹ Urging for choreography to be copyrighted in its own right, rather than as dramatico-musical compositions, de Mille wrote to the Copyright Office in 1959, stating: “Choreography is neither drama nor storytelling. It is a separate art. It is an arrangement in time-space, using human bodies as a unit design. It may or may not be dramatic or tell a story.”¹²⁰ Famously, de Mille was a victim of the inequality that resulted from lacking copyright protection for choreography, when she created the dances for the Rodgers and Hammerstein musical *Oklahoma!*¹²¹ For her work, de Mille was paid a lump sum of \$15,000 and did not receive royalties for subsequent productions that contained her choreography.¹²² Although *Oklahoma!* is still performed today and Rodgers’s and Hammerstein’s estates continue to receive royalties for these productions and for the use of their songs, de Mille has received nothing for the continued use of her choreography.¹²³ In light of the experiences of de Mille and others, and of the escalating popularity of dance in America, the time had come for a change and for the encouragement of the continued creation and protection of dances.

III. CHOREOGRAPHY IN THE LEGAL SPOTLIGHT: THE COPYRIGHT ACT OF 1976 AND ITS APPLICATION IN *HORGAN V. MACMILLAN, INC.*

As the popularity of classical ballet and other forms of dance began to skyrocket during the 1960s, the federal government and the law began to take notice of dance.¹²⁴ For the first time, Congress viewed dance, and particularly abstract forms of choreography, as an art form capable of providing the American public with identifiable benefits—a thought which it refused to entertain at the passage of the Copyright Act of 1909 and in the decades following.¹²⁵ With this change of heart and the gradual acceptance

119. *Id.* at 289 n.9.

120. Nicholas Arcomano, *The Copyright Law and Dance*, N.Y. TIMES, Jan. 11, 1981, at D8.

121. Hilgard, *supra* note 51, at 759.

122. *Id.*

123. *Id.* Productions of *Oklahoma!* amassed over \$60 million in just the first fifteen years since its first performance. Singer, *supra* note 68, at 289 n.9. De Mille once noted, “There are fifty shows around the world of *Oklahoma!* every week, and I could have been a millionaire.” *Id.* (citation omitted).

124. *See* discussion *supra* notes 109–17 and accompanying text (discussing the rapid increase in dance’s popularity in the United States throughout the dance boom and the measures taken by the federal government to encourage dance in America).

125. *See supra* notes 47–54, 56–59 and accompanying text (discussing the exclusion of abstract choreography in the Copyright Act of 1909 and the view of choreography and dance as an

of dance by the public, the stage was set for choreographers to finally receive legal protection and recognition for their efforts and contributions to the American artistic landscape.¹²⁶ Before exploring the inclusion of abstract choreography in the 1976 Act,¹²⁷ it is necessary to first understand the nature of copyright law, and specifically why certain works are excluded from copyright protection.

A. *The Limitations of Copyright Law and the Public Domain*

The Copyright Clause of the United States Constitution rewards the author of a creation with the exclusive right to make copies and distribute that creation, provided that it is of a type recognized by Congress to impart some benefit on the public.¹²⁸ As a result, the copyright holder maintains a monopoly of sorts over this work,¹²⁹ and the work is removed from what is known as the public domain.¹³⁰ The public domain can be defined as “that which is owned by everyone, and consequently [owned] by no one.”¹³¹ Works that are copyrighted, and thus extracted from the public domain, cannot be used by other members of the public without the consent of the copyright holder, arguably limiting expression under the First Amendment.¹³² This restraint on expression under the First Amendment is

insignificant art form); *see also* Abitabile & Picerno, *supra* note 55, at 43 (noting that in 1976 “Congress deemed choreography a ‘separate viable form of art’”).

126. Although choreographers had always received traditional recognition for their efforts, through choreographic credit and the licensing of their works, gaining legal protection was an important step, signifying the broader recognition of dance beyond its own community. *See supra* Part II.B (offering an overview of the traditional protections and recognition afforded to choreographers by the dance community).

127. *See* 17 U.S.C. §§ 101–1332 (2000).

128. *See supra* notes 42–46 and accompanying text (discussing the purposes of the Copyright Clause).

129. *See supra* note 43 and accompanying text (discussing the granting of exclusive rights to copyright holders).

130. WALTERSCHEID, *supra* note 43, at 266–67. Professor Walterscheid explains that the public domain is not controlled or regulated by the federal government and that “[t]he right of public access and use is near absolute.” *Id.* (footnote omitted). Another way of thinking about the public domain is that includes everything that is not subject to copyright protection. Lakes, *supra* note 44, at 1834.

131. WALTERSCHEID, *supra* note 43, at 266.

132. *Id.* at 466 (“[T]he issue of preclusion may involve the extent to which the intellectual property clause may be used to avoid restrictions on congressional authority prescribed by the First Amendment. To what extent does the exclusive right granted by copyright conflict with freedom of speech or freedom of the press?” (footnote omitted)). Although copyright law limits expression somewhat, and thereby implicates a clash with the First Amendment, Professor Walterscheid argues that there actually “is no[t] [a] conflict because copyright protects only forms of expression and not the ideas encompassed within those forms of expression, so that all remain free to use those ideas.” *Id.*; *see infra* notes 136–42 and accompanying text (discussing the limitations of copyrightable material as a weapon against limiting expression under the First Amendment). *But see* KEMBREW MCLEOD, FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY 8–9 (2005) (“The overzealous copyright bozos who try to use the law as a censorious

tolerated, however, because copyrights are granted for only limited durations.¹³³ Upon the expiration of those terms, the once copyrighted materials pass back into the public domain, free to be used by anyone.¹³⁴ Although copyrighted works can no longer be used by the public without restraint, this restriction is counteracted by the fact that these works are created for the public benefit, and thus copyrights are a necessary reward for those who engage in the process of creating for the public good.¹³⁵

This relationship between the public domain and copyrights explains why certain materials are necessarily exempted from copyright protection.¹³⁶ As an underlying principle, Section 102 of the 1976 Act states that an “idea, procedure, process, system, method of operation, concept, principle, or discovery” cannot be copyrighted.¹³⁷ However, the *expression* of such ideas

weapon mock the idea of democracy, and they step on creativity. As culture increasingly becomes fenced off and privatized, it becomes all the more important for us to be able to comment on the images, ideas, and words that saturate us on a daily basis—without worrying about an expensive, though meritless, lawsuit. The right to express one’s views is what makes these ‘copy fights’ first and foremost a free-speech issue.”)

133. See *infra* note 202 (discussing the duration of copyright protection).

134. See WALTERSCHEID, *supra* note 43, at 265–66. Professor Walterscheid explains the concept of the public domain by noting that “[t]he public ordinarily benefits at least twice from this bargain: once, when the original expression is first created, and then again when the expression is added to the public domain from which anyone may borrow freely to fashion new works.” *Id.* at 265 (quoting H.R. Rep. No. 92-487, 92th Cong., 1st Sess. (1984)).

135. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1013 (1990) (noting that a “traditional justification for the public domain is that the public domain is the public’s price for the grant of a copyright”); see *supra* notes 42–46 and accompanying text (discussing the rationale behind copyright law); see also MERGES ET AL., *supra* note 39, at 15 (“Because intellectual property rights impose social costs on the public, the intellectual property laws can be justified by the public goods argument only to the extent that they do on balance encourage enough creation and dissemination of new works to offset those costs. One of the reasons that intellectual property rights are limited in scope, duration, and effect is precisely in order to balance these costs and benefits.”).

136. Justin Hughes, *The Philosophy of Intellectual Property*, in INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 107, 127 (Adam D. Moore ed., 1997) (noting that the exemption of certain materials from copyright protection “is frequently explained in terms of balancing the need to reward artists with the need for free access to ideas, or as a tension between the copyright clause and the first amendment”).

137. 17 U.S.C. § 102(b) (2000). An important case relating to this issue is *Baker v. Selden*, decided by the Supreme Court of the United States in 1879. See MERGES ET AL., *supra* note 39, at 412; *Baker v. Selden*, 101 U.S. 99 (1879). In this case, Selden had a copyright in his book explaining the system of double-entry bookkeeping. *Id.* at 99–100. Baker subsequently produced books based on that same system. *Id.* at 101. The Court held that Baker’s actions did not amount to infringement of Selden’s copyright because the copyright of his book “did not confer upon him the exclusive right to make and use account-books . . . described and illustrated in said book.” *Id.* at 107. Rather, the Court reasoned that Selden had an exclusive right to publish the book, but “any person may practise [sic] and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it.” *Id.* at 104.

is copyrightable, even though ideas themselves may not be copyrighted.¹³⁸ Thus, while the idea for a movie or a book cannot be copyrighted, the expression of that idea in book or movie form is copyrightable.¹³⁹ Similarly, in the realm of literary works, simple words and short phrases may not be copyrighted.¹⁴⁰ Copyrighting words and phrases would extract them from the public domain and place too great a burden on others wishing to create with those words.¹⁴¹ As legal scholar Jessica Litman describes, “[l]anguage is sufficiently crucial that we insist on unrestricted access to words, even new words.”¹⁴²

Fortunately, abstract choreography no longer remains as a category of works that cannot be copyrighted.¹⁴³ Thanks to the demand by choreographers and Congress’s recognition of the importance of dance as an art form, abstract choreography was finally considered protectable by copyright under the 1976 Act.¹⁴⁴

138. MERGES ET AL., *supra* note 39, at 388. This concept is often known as the “idea-expression dichotomy.” *Id.* at 411.

139. *See, e.g., Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). In *Nichols*, a playwright alleged that the author of another play had infringed her copyright, based on the similarities of the defendant’s play. *Id.* at 120. The court held, however, that the copyright was not infringed because “the theme was too generalized an abstraction from what [was written and] . . . [i]t was only a part of [the author’s] . . . ‘ideas.’” *Id.* at 122. The court further commented that that author’s “copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain.” *Id.* Thus, the court is clear that while the plaintiff’s copyright protected her play as an expression of her ideas, those underlying ideas and themes were not protected by copyright. *Id.* at 123.

140. MERGES ET AL., *supra* note 39, at 437. Professor Merges notes that while words and phrases are not eligible for copyright protection, these terms could receive protection via trademark laws. *Id.* at n.19. For instance, Donald Trump received trademark protection for his famous expression “You’re fired” from the reality television show *The Apprentice*. MCLEOD, *supra* note 132, at 3.

141. Litman, *supra* note 135, at 1013; *see Lakes, supra* note 44, at 1840 (noting that the excessive granting of copyright protection would require creators to “constantly seek injunctions to stop others from utilizing material which had previously been used by all as a creative base” (footnote omitted)). For a further discussion of this concept in the realm of choreographic works, *see infra* note 327 and accompanying text.

142. Litman, *supra* note 135, at 1013. Even words that are unique and created by others cannot be copyrighted, despite the degree of originality that may have been used to create such a word. *Id.* As Professor Litman comments:

Granting copyright protection to an invented word would seem at first blush to be utterly harmless, for it would remove nothing from the commons that was there before the word’s author created it. Individual words, however, tend to seep into the language. We hear them, absorb them, and use them; we think in them whether they are old, familiar words or new, familiar words.

Id.

143. *See* 17 U.S.C. §§ 101–102 (2000).

144. *Id.*

B. Embracing the Abstract: The Copyright Act of 1976

Section 102 of the 1976 Act specifically grants copyright protection “in original works of authorship fixed in any tangible medium of expression, . . . from which they can be perceived, reproduced, or otherwise communicated”¹⁴⁵ Section 102 elaborates by listing the “works of authorship” that may be copyrighted, which includes “pantomimes and choreographic works[.]”¹⁴⁶ Therefore, to obtain protection, choreography must meet three conditions: it must be (1) a “choreographic work”; (2) an original creation; and (3) fixed in a tangible medium of expression.¹⁴⁷

1. Works of Authorship: Choreographic Works

As a threshold matter, copyrighted materials must be “works of authorship,” meaning that only the person who has conceived of the creation is entitled to obtain protection (“own” a copyright) and exercise his or her privileges, such as by bringing legal action for infringement.¹⁴⁸ An exception to this arises when the original copyright is transferred or assigned to another party, at which point the transferee possesses the same copyright privileges as the original copyright holder.¹⁴⁹ The “works made for hire” doctrine is also important to the issue of authorship, as it functions to place copyright ownership rights in an employer when an employee creates the work “within the scope of his or her employment.”¹⁵⁰ The issue of works made for hire has become a heated topic in recent litigation, pertaining to the works of modern dance choreographer Martha Graham, as it was argued that

145. 17 U.S.C. § 102(a).

146. 17 U.S.C. § 102(a)(4).

147. Cramer, *supra* note 73, at 147.

148. MERGES ET AL., *supra* note 39, at 388, 447. Thus, any person “who writes, composes, or paints an original work of authorship on her or his own today, acquires the copyright upon creation.” *Id.* at 447 (citation omitted).

149. *Id.* at 388, 446. A copyright is a recognized property right, so it may be transferred, divided, or assigned to another person. *Id.* at 446. Since a copyright confers on the owner several distinct rights, the copyright holder may transfer all of these rights collectively, or transfer only certain rights. *Id.*; see *infra* Part III.B (discussing the particular rights conferred by a copyright). However, a copyright differs from more traditional property rights since copyright protection grants to the holder rights for a limited period of time. MERGES ET AL., *supra* note 39, at 446; see *infra* note 202 (discussing the time limitations of copyrights under the 1976 Act).

150. 17 U.S.C. § 101 (2000); MERGES ET AL., *supra* note 39, at 447. The works made for hire doctrine and the issue of copyright ownership are beyond the scope of this Comment, however, general information on these topics is important for a complete understanding of the nature of copyright law. For an example of how the works made for hire doctrine has been applied in the realm of choreographic works, see *infra* note 151 and accompanying text.

Graham did not own choreography that she created while employed by a dance school.¹⁵¹

To obtain copyright protection for a particular creation, the work must first be of a copyrightable subject matter,¹⁵² which is defined by statutory enumeration,¹⁵³ as well as by those materials that are not entitled to

151. See *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004). In this case, the court addressed the issue of ownership and the application of the works made for hire doctrine to the choreographic works of modern dance choreographer Martha Graham. *Id.* at 628. Graham formed two non-profit corporations to financially support her work, first establishing the Martha Graham Center of Contemporary Dance, Inc. (the Center) in 1948, which she later sold to the Martha Graham School of Contemporary Dance, Inc. in 1956—the same year the school was established. *Id.* at 629. In 1989, Graham created a will that granted the rights to her dances to a close friend, Ronald Protas, but she did not specifically name these dances. *Id.* In 1992, the year following Graham's death, Protas claimed copyright ownership in these dances, and in 1998 Protas created the Martha Graham Trust to govern the licensing of these works. *Id.* at 630. Protas licensed several of the works and the teaching of the Martha Graham technique to the Center. *Id.* Experiencing some financial difficulties, the Center closed from 2000 to 2001, during which time Protas obtained copyright registration for thirty of Graham's pieces. *Id.* Upon its reopening, Protas filed for an injunction to prevent the Center from teaching the Martha Graham technique and using seventy of her pieces. *Id.* The Center then claimed that it owned the dances under the works made for hire doctrine. *Id.* at 631. The district court held that the works made for hire doctrine applied to all of the dances created by Graham while she was employed by the Center and the School, in addition to several that she had assigned directly to the Center, totaling forty-five dances. *Id.* On appeal, the Second Circuit applied an "instance and expense" test, in which "[a] work is made at the hiring party's 'instance and expense' when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out." *Id.* at 634, 635. In applying this test, the court reasoned that any dances created during Graham's employment at the Center from 1956 to 1965 were not works for hire because she worked only part-time as a teacher and she was not required to choreograph, nor was there evidence that any works she created were "created . . . at the 'instance' of the Center." *Id.* at 638. However, the court remanded to determine whether seven specific works created during this period were assigned to the Center. *Id.* at 638–39. The court next addressed the dances created by Graham between 1966 and 1976, the year Graham entered into a new contract with the Center. *Id.* at 639. The court determined that the works made for hire doctrine applied to these dances, as well, because during this time, the Center urged Graham to focus more on choreographing than on teaching, and she began working full-time and received an increase in her salary. *Id.* at 639–40. The court then examined Graham's choreographic works between 1978 and 1991, finding that these works were also works made for hire. *Id.* at 641. The court reasoned that there existed an employment relationship between Graham and the Center, based on factors such as her salary and benefits, and the fact that she created dances with the Center's resources. *Id.* On remand, the district court found that the seven works the Second Circuit asked to be reviewed were works made for hire and refused plaintiffs' request for a new trial. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 466 F.3d 97, 99 (2d Cir. 2006). The Second Circuit again reviewed the ownership of these seven works on appeal for clear error, finding that the district court did not err in finding that these dances were works made for hire and owned by the Center. *Id.* at 103. The outcome of this litigation sent shockwaves through the choreographic community. See Diane Solway, *When the Choreographer is Out of the Picture*, N.Y. TIMES, Jan. 7, 2007, at A1. In response to the court's ruling, the director of the American Dance Festival, Charles Reinhart, commented, "To think that Martha is for hire is like the pope saying to the devil, 'Come to dinner.'" Felicia R. Lee, *Graham Legacy, on the Stage Again*, N.Y. TIMES, Sept. 29, 2004, at E1 (internal quotation marks omitted).

152. MERGES ET AL., *supra* note 39, at 388.

153. Section 102 extends copyright protection to "(1) literary works; (2) musical works, including

copyright protection.¹⁵⁴ The 1976 Act included “choreographic works” as a copyrightable subject matter for the first time in the history of copyright law.¹⁵⁵ Despite granting protection to choreography, the Act neglects to provide a specific definition for “choreographic works.”¹⁵⁶ This was not a mere oversight on the part of Congress, however, as the House Report to the 1976 Act (the House Report) concluded that “choreographic works” are among copyrightable subject matter that “have fairly settled meanings.”¹⁵⁷ The House Report continued, explaining that it was not “necessary to specify that ‘choreographic works’ do not include social dance steps and simple routines.”¹⁵⁸

It was the United States Copyright Office that finally derived a definition for “choreographic works” in 1984, when it published *Compendium II of Copyright Office Practices (Compendium II)*.¹⁵⁹ According to *Compendium II*, “[c]horeography is the composition and arrangement of dance movements and patterns Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial

any accompanying words; (3) dramatic works, including any accompanying music; (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.” 17 U.S.C. § 102(a) (2000).

154. See *supra* notes 136–42 and accompanying text (discussing the notion that certain materials are ineligible for copyright protection because extending copyrights to such materials would remove them from the public domain and place an increased burden on the public and future creation).

155. See 17 U.S.C. § 102.

156. Bethany M. Forcucci, *Dancing Around the Issues of Choreography & Copyright: Protecting Choreographers After Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, 24 QUINNIPIAC L. REV. 931, 938 (2006).

157. H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667; see also Lakes, *supra* note 44, at 1843. The lack of a clear, congressional definition for “choreographic works” has drawn a great deal of criticism from those studying the application of the 1976 Act to the creations of choreographers. See *infra* notes 298–300 and accompanying text (summarizing the main criticisms regarding the missing legal definition of “choreographic works”).

158. H.R. REP. NO. 94-1476, at 53–54 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5667; see also Lakes, *supra* note 44, at 1843.

159. U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT PRACTICES UNDER THE COPYRIGHT LAW WHICH BECAME FULLY EFFECTIVE ON JANUARY 1, 1978, INCLUDING TITLE 17 OF THE UNITED STATES CODE AND AMENDMENTS THERETO § 450 (1984); Lakes, *supra* note 44, at 1843. It is important to note that while *Compendium II*'s definition of “choreographic works” is most commonly cited by courts, scholars, and legal professionals, this particular definition is not a legal or statutory definition framed by Congress. See *supra* notes 156–58. However, courts generally defer to this definition in the adjudication of legal disputes, such as in *Horgan v. Macmillan, Inc.*, decided by the United States Court of Appeals for the Second Circuit in 1986. *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161–62 (2d Cir. 1986) (citing to *Compendium II*'s definition of “choreographic works” in its discussion of the copyrighting of choreography). For an overview of *Horgan v. Macmillan, Inc.* and the importance of this case to choreographic copyrights, see *infra* Part III.D.

relationships. Choreographic works need not tell a story in order to be protected by copyright.”¹⁶⁰ The parameters of copyrighting choreography are further explained by *Compendium II*, as it excludes “[s]ocial dance steps and simple routines” from copyright protection, such as “the basic waltz step, the hustle step, and the second position of classical ballet”¹⁶¹

2. Originality

The second hurdle that choreography must clear to obtain copyright protection is that it must be an “original work[] of authorship.”¹⁶² In this context, originality has a fairly flexible meaning,¹⁶³ commanding “that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”¹⁶⁴ A choreographic work is not required to be novel to be original, and a particular work can even look like another piece of choreography, so long as the choreography is not copied in full.¹⁶⁵ With these criteria, it is fairly simple for a choreographic work to qualify as

160. U.S. COPYRIGHT OFFICE, *supra* note 159, § 450.01.

161. *Id.* at § 450.06. This does not mean, however, that “social dance steps and simple routines” cannot be included in the creation of a choreographer’s work. *Id.* Rather, the Copyright Office explains that “[s]ocial dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material.” *Id.*

162. 17 U.S.C. § 102(a) (2000) (emphasis added).

163. The Supreme Court has noted that “[t]he standard of originality is low, but it does exist.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991). Furthermore, the House Report accompanying the 1976 Act states that “[t]he phrase ‘original works of authorship,’ . . . is purposely left undefined” H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

164. *Feist*, 499 U.S. at 345. This standard thus excludes facts from the boundaries of copyright protection, as decided by the Supreme Court in the 1990 case of *Feist Publications, Inc. v. Rural Telephone Service Co.* *See id.* at 340. In that case, Rural, a telephone company, published an annual telephone book with the telephone numbers of its customers. *Id.* at 342. Feist, a company that also publishes telephone books, used this information without the permission of Rural, prompting Rural to sue Feist for copyright infringement. *Id.* at 342–44. The Court held, however, that Feist did not engage in copyright infringement. *Id.* at 364. The Court reasoned that the information contained in Rural’s telephone books was not eligible for copyright protection because it consisted merely of facts, and thus, “were not original to Rural.” *Id.* at 363–64. Although Rural argued that a copyright existed by virtue of “originality in its coordination and arrangement of facts,” the Court rejected this argument noting that “there is nothing remotely creative about arranging names alphabetically in a white pages directory.” *Id.* at 363.

165. *Feist*, 499 U.S. at 345; *see also* *Lakes*, *supra* note 44, at 1845; *see also* H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (stating that the standard for originality “does not include requirements of novelty, ingenuity, or esthetic merit . . .”). This clarification by the House Report, that originality is not based on aesthetic merit, is an important one because choreographers fear, and rightly so, that such assessments of the artistic merits of their creations would make it too easy for courts to reject copyright protection, based on an erroneous judgment of the work’s artistry. Singer, *supra* note 68, at 301.

“original.”¹⁶⁶ As one writer has noted, this loose standard enabled George Balanchine to obtain a copyright for his version of *The Nutcracker*, a ballet classic that has endured countless choreographic interpretations.¹⁶⁷

3. Fixation

As a final condition for receiving copyright protection, choreographic works must be “fixed in any tangible medium of expression.”¹⁶⁸ The choreographic material must be fixed in such a way, that it “can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁶⁹ Consequently, choreography is not fixed by a live performance of the piece, even though a performance is a manifestation of the steps, because a live performance alone does not permit the reproduction of the work.¹⁷⁰ Similarly, improvisational dancing cannot be protected by copyright as a choreographic work since it is spontaneous and does not meet the fixation requirement.¹⁷¹ Provided that his or her creation is original and of a subject matter supported by copyright law, an artist is entitled to a copyright at the very moment that creation is fixed.¹⁷² A

166. See *supra* notes 162–65 and accompanying text.

167. Lakes, *supra* note 44, at 1845. While choreographing an original version or interpretation of a particular ballet can be a way for a choreographer to be original and add his or her own mark to dance history, such an act has not been immune from criticism. For instance, *The Nutcracker* has undergone so many interpretations by various choreographers, that this has prompted one dance writer to comment, “Can we agree . . . that it is time to declare a moratorium on updated remakes of ‘The Nutcracker’ and other classics?” Kisselgoff, *supra* note 107, at E1. Another commentator has noted that by contributing new choreography to the original choreography of some of the classic ballets, such as *Swan Lake* and *The Sleeping Beauty*, choreographers are “mangling great ballets.” Anderson, *supra* note 72, at A8. Anderson further disparages this practice, stating that while choreographers who re-work a classic may assume that they are “revitalizing” the choreography, instead they are “vandalizing” the original piece. *Id.*

168. 17 U.S.C. § 102(a) (2000).

169. *Id.*

170. Lula, *supra* note 72, at 182 (“[F]ederal courts hold that regardless of the number of times a dance has been publicly performed, it is considered a choreographic work and therefore protected under the Act only when it is fixed in a tangible copy for the first time. This differs from the travel journal, which is ‘fixed’ the moment the pen scratches the page.” (footnote omitted)).

171. MERGES ET AL., *supra* note 39, at 441.

172. Cramer, *supra* note 73, at 148. A copyright does not need to be registered with the U.S. Copyright Office in order for a copyright to be valid. 17 U.S.C. § 408(a) (2000). Registration of a copyright is optional and failing to register does not affect the validity of a copyright that arises once an original work is fixed. *Id.*; see MERGES ET AL., *supra* note 39, at 409. However, should a copyright holder wish to pursue legal action for copyright infringement, registration of the copyright is a necessary prerequisite. 17 U.S.C. § 411(a) (2000) (“[N]o action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title.”).

choreographer can only obtain a copyright on the choreographic work exactly as it appears in its fixed form, so a method of fixation that replicates the choreography thoroughly and accurately is pivotal.¹⁷³

Congress has left its definition of fixation intentionally broad to enable those seeking copyright protection to use the easiest and best possible methods to fix their works and obtain protection.¹⁷⁴ However, choreographers seeking to copyright their creations have not exactly benefitted from the expansiveness of this definition in the way that authors of books and songs have.¹⁷⁵ At present, there are only a few notable—and imperfect—ways of “fixing” choreography in a tangible form: film, notation, and computer technology.¹⁷⁶

Video recording is, by far, the simplest method of fixing a choreographic work.¹⁷⁷ It is relatively easy for a choreographer to record a particular work with a basic video recorder at a fairly low cost.¹⁷⁸ Film technology is also quite advanced and constantly improving, thereby enhancing the quality and ensuring more accurate fixation of the work.¹⁷⁹ Fixation of choreography by film has been criticized, however, because of its inability to fully represent the intent behind the choreography¹⁸⁰ and “the three-dimensional aspect of the dance.”¹⁸¹ Moreover, film records each

173. DANCE HERITAGE COALITION, INC., A COPYRIGHT PRIMER FOR THE DANCE COMMUNITY 5 (2003), available at <http://www.danceheritage.org/publications/Copyright-Primer.pdf>. Many of the methods that exist today to fix choreography in a tangible form have been sharply criticized either because such modes are incapable of capturing the choreography accurately, or because these modes are far too expensive for choreographers, despite their precision. See *infra* notes 302–07 and accompanying text (describing the attacks of the current fixation requirements and the methods of fixation available to choreographers).

174. H.R. REP. NO. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665 (“This broad language is intended to avoid . . . artificial and largely unjustifiable distinctions . . .”).

175. Lula, *supra* note 72, at 182; see also Anne K. Weinhardt, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 846 (1988) (noting that “[t]he problem is that choreography is transient; it is expressed by the planned movement of dancers through time and space, which makes it difficult to fix in a tangible medium” (footnote omitted)).

176. Lopez de Quintana, *supra* note 50, at 158.

177. *Id.* at 159.

178. *Id.* While video technology is the least expensive means of fixing choreography, “the broadcast media turn to lossless digital formats, high-definition broadcast capabilities, and widescreen formats, even the amateur documentary filmmaker will need to be well-versed on what cameras, technical support, and crew are best for the project.” DANCE HERITAGE COALITION, INC., DOCUMENTING DANCE: A PRACTICAL GUIDE 11 (2006), available at <http://www.danceheritage.org/publications/DocumentingDance.pdf> [hereinafter DOCUMENTING DANCE].

179. Lopez de Quintana, *supra* note 50, at 159; Lakes, *supra* note 44, at 1855.

180. Lopez de Quintana, *supra* note 50, 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.” (footnote omitted)).

181. Weinhardt, *supra* note 175, at 848. On the topic of filming dance for television, Ballet Master in Chief of the New York City Ballet, Peter Martins, has said: “[T]here is no space in television. When you make a dance for the stage, you work with a straight line, a circle, a semicircle, a diagonal. There are the options. On television, these options become totally

mistake that a dancer may make in the choreographed steps, as well as any portion of the dancer's performance that may divert from the rhythm of the music.¹⁸² Varying camera angles¹⁸³ and distortions of stage lighting can also combine to create a reproduction that may look nothing like the original.¹⁸⁴

Where accuracy is concerned, it is agreed that formal dance notation is the best possible method of recording choreography.¹⁸⁵ Resembling a musical score, dance notation produces a written record in which marks representing individual steps of choreography are placed on a staff.¹⁸⁶ Beyond recording the steps of the choreography, notation can also document the emotions and mood that a dancer should evoke while performing certain steps.¹⁸⁷ Despite its accuracy and other advantages, notation usually requires the services of an expert in the craft¹⁸⁸ and, unless the choreographer himself

distorted.” Cramer, *supra* note 73, at 150.

182. Lopez de Quintana, *supra* note 50, at 160. Recording accurate rhythms becomes a special problem in videotaping tap dancing choreography. DOCUMENTING DANCE, *supra* note 178, at 13. Capturing the exact rhythms and beats of the taps as the dancer's shoes hit the floor is vital to the accurate reproduction of tap choreography, so a sound technician may be required to ensure “that the recording levels of both the music and the taps strike a balance of sound.” *Id.*

183. Weinhardt, *supra* note 175, at 848–49.

184. DOCUMENTING DANCE, *supra* note 178, at 13.

185. See Lula, *supra* note 72, at 182; see Weinhardt, *supra* note 175, at 846; see Lopez de Quintana, *supra* note 50, at 159; see Lakes, *supra* note 44, at 1854; see DOCUMENTING DANCE, *supra* note 178, at 8.

186. Weinhardt, *supra* note 175, at 846. There are several different systems of formal notation available to the choreographer, as a new notation method has been developed every four years since 1928. Lula, *supra* note 72, at 183. While the presence of so many systems may seem excessive to some, this is actually quite beneficial. The process of creating choreography is so individual and unique to the choreographer that it makes sense that various systems would exist, from which choreographers can choose one that fits their own personal style. See *id.* Labanotation is one of the more prevalent systems among choreographers. Weinhardt, *supra* note 175, at 846. Labanotation was developed in the early 20th century by choreographer and theorist Rudolf Laban. Amy Kail, *Rudolf Laban*, DANCE TEACHER, Dec. 1, 2007, at 94. In Laban's early experiments with dance notation, he aimed to develop a system that “involved becoming aware of the body in relationship to space, others and the changing nature of time and dynamics, and provided underlying movement concepts and language.” *Id.* Along with Labanotation, Benesh Movement Notation remains another popular choice for formal dance notation. DOCUMENTING DANCE, *supra* note 178, at 8–9. Benesh Movement Notation was developed in 1956 for the recording of choreography, but it has also “been used successfully by anthropologists, by physiotherapists to analyse [sic] and record patient movement, and even in an ergonomic study of seating in an airport.” About Benesh, http://www.benesh.org/BNAbout_Benesh.html (last visited Oct. 14, 2008).

187. Lula, *supra* note 72, at 182–83.

188. The number of experts skilled in dance notation is relatively low. Weinhardt, *supra* note 175, at 848. Recently, the teaching of dance notation among dance students has been encouraged, not only to increase the number of those trained in notation, but also, learning notation can be a great way for dance students to better understand movement and the ways that it can be creatively employed in choreography. Amy Kail, *Notable Instruction*, DANCE TEACHER, Mar. 1, 2007, at 44.

is skilled in notation, can be extremely expensive.¹⁸⁹ Notating only about twenty minutes of choreography can cost between \$1,200 and \$1,400,¹⁹⁰ which is well beyond the budgets of most dance companies.¹⁹¹ Improvements may be in store, however, as some of these formal notation systems are now available through computer programs, making the notation process quicker and aiding the teaching of dance notation, which will help decrease costs.¹⁹²

In recent years, computer technology has also evolved to aid in the process of notating choreography.¹⁹³ One benefit of relying on computer notation programs is that such systems tend to be less expensive than traditional, written notation systems.¹⁹⁴ Additionally, these programs function by permitting choreographers to set movements and steps first on three-dimensional figures prior to teaching the choreography to the dancers in a studio.¹⁹⁵ While these programs have the advantage of allowing choreographers to create at any time without expending the costs of relying on professional dancers,¹⁹⁶ many choreographers have not embraced this new technology.¹⁹⁷ When it comes to creating a dance, each choreographer has an individual style¹⁹⁸ and some prefer to work with live bodies from the start, rather than computerized figures.¹⁹⁹ It is clear that no notation system—video, formal notation, or computers—is flawless, but technology is constantly advancing and will usher in improvements of the current notation systems.²⁰⁰

189. Lula, *supra* note 72, at 183.

190. *Id.*

191. Weinhardt, *supra* note 175, at 848.

192. For instance, The Benesh Institute, which manages Benesh Movement Notation, has released a computer program called the Benesh Notation Editor, allowing for the electronic notation of choreography as well as easier storage, alteration, and transmission of notation scores. Benesh Notation Editor, http://www.benesh.org/BNBNE_Whatisbne.html (last visited Oct. 14, 2008).

193. Cramer, *supra* note 73, at 150.

194. Lakes, *supra* note 44, at 1855.

195. Lopez de Quintana, *supra* note 50, at 160–61.

196. Cramer, *supra* note 73, at 150–51. Modern dance choreographer Merce Cunningham was one of the first to support the use of this technology for recording his dances. *Id.* at 150. Relying on a program called Life Forms, Cunningham has observed that this program has enabled him to better visualize the choreography throughout its creation. *Id.* at 151.

197. Lopez de Quintana, *supra* note 50, at 161. One complaint among many choreographers who reject computer notation is that such technology has no means of capturing the emotions of a particular dance, which can be just as important as the actual steps themselves. *Id.*

198. See discussion *supra* notes 65–72 and accompanying text (noting the various and unique methods used by choreographers to create their dances).

199. See *supra* note 71 and accompanying text.

200. At a conference on the preservation of dance, one participant objected to new computer technology, stating, “You can ruin the choreography!” Jennifer Dunning, *How to Tell the Computer From the Dance: Technology Now Contributes to Choreography Instead of Just Recording It*, N.Y. TIMES, Feb. 23, 1999, at E1, E3. A designer of such software answered, “We’re talking about documentation. We’re dealing here with the analytical mode. If you want an esthetic

C. Rights of the Copyright Holder

The choreographer who goes through the process of seeking copyright protection for her work is rewarded with legal protection that provides her with several exclusive rights relating to the use of her dances.²⁰¹ Under Section 106 of the 1976 Act, the copyright holder has the exclusive right: “(1) to reproduce the copyrighted work in copies . . . ; (2) to prepare derivative works based upon the copyrighted work; . . . [and] (4) in the case of . . . choreographic works, . . . to perform the copyrighted work publicly”²⁰² The statute provides for several other rights to be granted to copyright holders, but these three rights are the most pertinent to the protection of choreographic works.²⁰³

1. The Right to Copy

The right to copy provides the owner with the exclusive claim to produce any copies of the original work, as the word “copyright” suggests.²⁰⁴ As defined by the 1976 Act, “copies” include “material objects, . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated,

experience, watch live or from a front angle.” *Id.* This demonstrates that while such notation methods may not be ideal for communicating choreography and dance, perhaps it is best to rely on available methods for the sake of recording these dances. *See, e.g.,* Lula, *supra* note 72, at 193 (“[C]omputer technology may be the best way to facilitate compatibility between the dance community and the legal arena.”).

201. *See* 17 U.S.C. § 106 (2000).

202. *Id.* The period during which an author’s work is protected by copyright has changed significantly over the years. Copyright protection was first granted for a period of twenty-eight years (and renewable for another twenty-eight year period) under the Copyright Act of 1909. MERGES ET AL., *supra* note 39, at 465. The 1976 Act then extended protection to last for the life of the author, plus an additional fifty years. *Id.* This term was once again extended most recently in 1998, under the Sonny Bono Copyright Term Extension Act, which now grants copyrights for the life of the author plus seventy years. *Id.* at 466. The momentum behind the passage of this Act resulted from the fact that “copyrights from the 1920s and 1930s [were] set to expire, [so] heirs of music composers (such as George and Ira Gershwin) as well as major content companies (such as the Walt Disney Corporation, which feared the loss of protection for Mickey Mouse)” pushed for an extension. *Id.*

203. Lopez de Quintana, *supra* note 50, at 170. The statute also provides copyright holders with the right “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; . . . in the case of . . . choreographic works, . . . to display the copyrighted work publicly; and . . . in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.” 17 U.S.C. § 106.

204. *See* 17 U.S.C. § 106.

either directly or with the aid of a machine or device.”²⁰⁵ To be a copy of a protected work, the duplicated material need not only be a precise replica.²⁰⁶ The 1976 Act provides a more relaxed standard by conferring “the right to prevent others from making exact or ‘substantially similar’ reproductions”²⁰⁷ Thus, this substantial similarity standard creates a more flexible basis on which to find copyright infringement, yet it also creates more pliable boundaries within which artists can create, while continuing to be inspired by those who have come before them.²⁰⁸

2. The Right to Perform and the Right to Create Derivative Works

Current copyright law grants to the copyright holder exclusively the right to perform the protected material publicly.²⁰⁹ Under the 1976 Act, public performance rights are implicated when a protected work is performed in a public location or is conveyed to the public “by means of any device or process”²¹⁰ As such, any dance company wishing to perform the choreography of George Balanchine,²¹¹ which is protected by copyright, must obtain a license to stage and perform his choreography.²¹²

Once a copyright is granted, the owner also obtains the right to produce derivative works that are based on the original, copyrighted work.²¹³ A derivative work is delineated by the 1976 Act as “a work based upon one or

205. 17 U.S.C. § 101 (2000).

206. MERGES ET AL., *supra* note 39, at 475.

207. *Id.* As a result, the general standard for discovering the infringement of a copyright is a “substantial similarity” standard. See Weinhardt, *supra* note 175, at 851–52. The standard for copyright infringement was established in *Arnstein v. Porter*, which requires the plaintiff to show copying of his work by the defendant. *Id.* Copying may be established by the defendant’s own disclosure, but more often, it is proven through the use of circumstantial evidence, showing “that the defendant had access to the plaintiff’s work and that the defendant’s work is substantially similar to the plaintiff’s work.” *Id.* at 852 (footnote omitted). For an example of the application of the substantial similarity standard in the evaluation of an infringement claim for a choreographic work, see *infra* notes 250–55 and accompanying text (discussing the application of the substantial similarity standard in the case of *Horgan v. Macmillan*).

208. MERGES ET AL., *supra* note 39, at 476. Professor Merges observes that infringement can often be difficult to detect, since “many copyrightable works intermingle original expression with public domain materials, ideas, facts, stock literary elements, scenes à faire, and other nonprotectable elements.” *Id.*

209. 17 U.S.C. § 106.

210. 17 U.S.C. § 101. Under this standard, then, “[a]ny physical act taken to make a work perceivable to the viewer or listener, or cause a work to be reproduced . . . is a performance.” MERGES ET AL., *supra* note 39, at 514.

211. See *supra* notes 53, 66, 71, 102–07 and accompanying text (discussing the life and the choreography of George Balanchine).

212. The George Balanchine Trust, <http://www.balanchine.com/content/site/show/thetrust> (last visited Oct. 14, 2008). For a further discussion of the establishment and the functioning of the Balanchine Trust, see *infra* note 234 and accompanying text.

213. See 17 U.S.C. § 106.

more preexisting works”²¹⁴ A common example of a derivative work is the familiar practice of producing feature films that are based on books or plays.²¹⁵ This right is particularly relevant, as legal scholar Barbara Singer notes, “[i]n light of the current popularity of mounting new and innovative productions of old and classical dances, . . . both [to] those who create the original works and those who wish to restage them”²¹⁶

3. Moral Rights

Traditionally, American copyright law has differed from European copyright law in the primary interests that the law seeks to protect.²¹⁷ Whereas American copyright law encourages the dual goals of rewarding artists and encouraging creation for the good of society, the moral rights provisions under European copyright law seek primarily to protect the author, and, in particular, his artistic rights.²¹⁸ Some of the most common protections associated with copyright law in the European moral rights tradition include the right of paternity and the right of integrity.²¹⁹ The right of paternity guarantees to authors or artists that they can attach their name to their creations.²²⁰ The right of integrity protects the author by prohibiting any alteration of his creations without his consent.²²¹ Beyond these basic moral rights, the right of divulgation is extended in some countries,²²² which grants authors the right to “control the terms under which their works are first disclosed to the public.”²²³ Finally, the right of withdrawal is

214. 17 U.S.C. § 101.

215. *Id.* The statute cites several other examples of derivative works, “such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.” *Id.*

216. Singer, *supra* note 68, at 305. For a general discussion and criticism of the restaging of classic ballets and dances, see *supra* note 82.

217. See *supra* notes 42–46 and accompanying text (discussing the purposes of American copyright law).

218. See *supra* notes 42–46 and accompanying text (explaining the constitutional underpinnings of American copyright law).

219. GOLDSTEIN, *supra* note 45, at 283.

220. *Id.* at 285. This right can also be applied negatively, with an author “publishing his work under a pseudonym or by keeping it anonymous.” *Id.*

221. *Id.* at 287 (noting that the Berne Paris Text grants “the right ‘to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation’” (citation omitted)).

222. *Id.* at 283.

223. *Id.* at 289.

recognized in a minority of countries to “grant authors an explicit moral right to withdraw their work from circulation, typically in situations when the work no longer accurately reflects their views.”²²⁴

Recently, United States copyright law has embraced a few of these moral rights in a very limited context.²²⁵ The impetus for adopting any sort of moral rights into American copyright law came not as the result of artists and authors pushing for change, but rather, as a condition of joining the Berne Convention, providing for international copyright protection.²²⁶ As a prerequisite to attaining membership, a country must, at minimum, provide for the rights of paternity and integrity.²²⁷ While the rights of paternity and integrity now exist in American copyright law, their protections are currently extended only to visual artists.²²⁸

D. *The 1976 Act in Action: Horgan v. Macmillan, Inc.*

Following the enactment of the 1976 Act, one of the first cases to address the issue of copyright infringement of a choreographic work was *Horgan v. Macmillan, Inc.*, decided by the United States Court of Appeals for the Second Circuit in 1986.²²⁹ The case centered on the publication of a book on *The Nutcracker*, telling the story that inspired the classic ballet and

224. *Id.* at 290 (footnote omitted).

225. See MERGES ET AL., *supra* note 39, at 519.

226. *Id.* at 519, 616–17. Under the Berne Convention, “[a]uthors from signatory nations obtain[] ‘national treatment’—i.e., the same rights as domestic authors—in each member nation.” *Id.* at 616. The United States became a member of the Berne Convention in 1989. *Id.* at 617. Its membership was the result of the boom in global trade and business during the 1980s, as “piracy of copyrighted works in many corners of the world increased.” *Id.*

227. See *id.* at 619.

228. *Id.* at 519. Under the Visual Artists Rights Act, ratified by Congress in 1990, the author of a work of visual art—(1) shall have the right—(A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; . . . and (3) . . . shall have the right—(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right

17 U.S.C. § 106A(a) (2000). Artists other than visual artists may have a type of moral rights remedy under other areas of the law, such as unfair competition and contract. GOLDSTEIN, *supra* note 45, at 286; see, e.g., Gilliam v. Am. Broad. Cos., 538 F.2d 14 (2d Cir. 1976) (granting an injunction based on unfair competition to the comedy group Monty Python because the editing of their television show by defendant constituted mutilation of the work).

229. See *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986). The only other federal appellate case to address any issue relating to the copyrighting of choreography and the application of the 1976 Act was *Martha Graham School & Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc.*, decided by the Second Circuit Court of Appeals in 2004. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004); see also Lakes, *supra* note 44, at 1848, 1848 n.130. For a further discussion of this case, see *supra* note 151 and accompanying text.

containing photographs of George Balanchine's version of the ballet,²³⁰ as performed by members of New York City Ballet (NYCB).²³¹ The court addressed the "novel" issue of whether these photographs of Balanchine's version of the ballet infringed his copyright on the choreography.²³²

Balanchine obtained a copyright on his choreography of *The Nutcracker* in 1981, two years prior to his death in 1983.²³³ Following his death, Balanchine left the rights to many of his ballets to various dancers he had worked with, all of whom deposited their rights into The Balanchine Trust, an irrevocable trust created to simplify the management and licensing of Balanchine's works.²³⁴ Specifically, Balanchine left the rights to *The Nutcracker* to Barbara Horgan, Balanchine's long-time personal assistant and executor of his estate.²³⁵ Horgan discovered in early 1985 that a publisher, Macmillan, intended to print this particular book on *The*

230. The pictures were taken by two photographers who were regarded as NYCB's "official photographers." *Horgan*, 789 F.2d at 159. As such, the defendants in this case argued that the photographers' status justified the taking and using of these pictures for the book. *Id.* This was not an issue that the Second Circuit was willing to sort through in this case, but rather, it directed the district court to further examine this point on remand. *Id.* at 163.

231. *Id.* at 158–59.

232. *Id.* at 158.

233. *Id.*

234. Swack, *supra* note 52, at 269–70. The Balanchine Trust was not created until 1987, one year after the *Horgan* decision. The George Balanchine Trust, <http://www.balanchine.com/content/site/show/thetrust> (last visited Oct. 14, 2008). Upon George Balanchine's death in 1983, he "specifically bequeathed the domestic, foreign and media rights in 113 ballets to fourteen individual legatees . . ." Swack, *supra* note 52, at 269 (footnote omitted). The Balanchine Trust was created as a means of managing and administering licenses to perform Balanchine's ballets. *Id.* at 270. The Trust functions as an irrevocable trust and anyone who received the rights to Balanchine's works upon his death can deposit those rights into the trust, but may not revoke this action at any time. *Id.* at 270–71. Furthermore, the individual legatees maintain:

[C]omplete control over a particular dance Thus, when a ballet company requests performance rights to dance a certain Balanchine ballet, the legatee alone decides whether to permit that company to perform the ballet and also decides who will stage the work. Upon death, the legatee forfeits control of the dance, although the legatee's heirs continue to receive all royalties flowing from the ballet.

Id. at 271 (footnotes omitted). Any company wishing to license one of Balanchine's works must submit a written request to perform the piece and include "the name of the ballet; . . . performance dates and proposed length of license (per performance, or a multi-year period); venue information and ticket prices, proposed rehearsal period, and number of male and female dancers in the company." The George Balanchine Trust, <http://www.balanchine.com/content/site/show/licensing> (last visited Oct. 14, 2008). Additionally, the Trust requires the requesting company to submit a recording of a recent performance of the company that demonstrate "the dancers' technique, agility, and speed." *Id.*

235. *Horgan*, 789 F.2d at 158; Swack, *supra* note 52, at 269–70 n.17.

Nutcracker.²³⁶ Macmillan provided mock-ups of the text and photographs that it planned to print to Lincoln Kirstein, artistic director of NYCB, who passed those on to Horgan.²³⁷

The attorney for Balanchine's estate then sent two letters to Macmillan in April of 1985, the first stating that use of the photographs likely constituted a derivative work and that publication should not proceed without receiving a license from the estate.²³⁸ The second letter stated that Horgan would not grant a license to Macmillan for publication.²³⁹ Macmillan then sent a letter to Horgan and to the estate's attorney, affirming its intent to proceed without a license.²⁴⁰ The estate sent a final letter to Macmillan, "demanding immediate assurance that the book would not be published without the estate's permission."²⁴¹ This letter went unanswered and the book was printed later that year.²⁴²

Horgan filed for preliminary and permanent injunctions against Macmillan, as well as a temporary restraining order, in the district court in October of 1985.²⁴³ The district court refused to grant the injunctions, however, finding that the copyright on Balanchine's choreography had not been infringed, since "still photographs . . . catch dancers in various attitudes at specific instants of time; they do not, nor do they intend to, take or use the underlying choreography. The staged performance could not be recreated from them."²⁴⁴ Horgan then filed an appeal with the Second Circuit Court of Appeals.²⁴⁵

Horgan raised two arguments on appeal: first, that the book copied the protected choreography, and second, that the book was an unlawful "derivative work" of the copyrighted choreography.²⁴⁶ Horgan also

236. *Horgan*, 789 F.2d at 158–59.

237. *Id.*

238. *Id.* at 159.

239. *Id.*

240. *Id.* The letter specifically communicated Macmillan's belief that publication of the book would not infringe any protected material, maintaining "that it is unnecessary for us to obtain any authorization from the Balanchine (sic) Estate in connection with our proposed work since, as a legal matter, we are completely satisfied that the work in no way violates or infringes upon any proprietary rights of Mr. Balanchine or his successors-in-interest." *Id.*

241. *Id.*

242. *Id.* The book included several "black and white photographs of George Balanchine directing a rehearsal of the ballet," in addition to "60 color photographs . . . of scenes from the New York City Ballet Company production of *The Nutcracker*, following the sequence of the ballet's story and dances." *Id.* (italics added).

243. *Id.* at 159–60.

244. *Id.* at 160. The district court specifically noted that the book's publication did not violate Balanchine's copyrighted material since "choreography has to do with the flow of the steps in a ballet." *Id.*

245. *Id.*

246. *Id.* at 161 (citing *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 22 (2d Cir. 1966)).

maintained that the district court applied an incorrect test in its analysis, as it examined whether the choreography could be reconstructed from the pictures, rather than looking at whether the photographs are substantially similar to the protected choreographic work.²⁴⁷ Macmillan argued that the photographs could not be substantially similar to the choreography, since “photographs . . . do not capture the flow of movement, which is the essence of dance,” as defined by *Compendium II*’s definition of “choreographic works.”²⁴⁸

The Second Circuit held that the district court was incorrect in concluding that the photographs could not infringe Balanchine’s choreography.²⁴⁹ The standard for determining infringement that the district court should have used is indeed a substantial similarity standard, rather than examining whether a protected work could be replicated based on an infringing work.²⁵⁰ Specifically, the court reiterated that the proper test “is whether ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.’”²⁵¹ As such, infringement can be found even if only a minor portion of the protected work is used—even if the original cannot be reconstructed—as long as the portion is “qualitatively significant.”²⁵² Thus, a photograph could potentially infringe the copyright protections for choreographic works, depending on the value of the portion used, in reference to the underlying work.²⁵³ Ultimately, the court remanded the

247. *Horgan*, 789 F.2d at 161. For a further discussion of the substantial similarity standard, see *supra* Part III.C.1.

248. *Horgan*, 789 F.2d at 161–62; see *supra* notes 159–61 and accompanying text (explaining *Compendium II*’s definition of “choreographic works”). Reinforcing the importance of *Compendium II*’s definition, both the court and the parties relied on this particular interpretation of “choreography” in the adjudication of this dispute. *Horgan*, 789 F.2d at 161–62.

249. *Id.* at 163.

250. *Id.* at 162.

251. *Id.* (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

252. *Horgan*, 789 F.2d at 162. To highlight this point, the court used the example of the film *Gone With The Wind*, asserting that “[i]t surely would not be a defense to an infringement claim against the movie version . . . that a viewer of the movie could not create the book.” *Id.*

253. *Lopez de Quintana*, *supra* note 50, at 151. Although the correct test for determining copyright infringement is not whether the protected work can be reproduced from the infringing copy, the court commented that the district court was too quick to dismiss the possibility of reconstructing choreography based on a picture. *Horgan*, 789 F.2d at 163. The court noted that “[a] snapshot of a single moment in a dance sequence may communicate a great deal. It may, for example, capture a gesture, the composition of dancers’ bodies or the placement of dancers on the stage.” *Id.* The court examined one photograph from *The Nutcracker* of the dancing “Sugar Canes,” in which a dancer is jumping through a hoop with the “legs . . . thrust forward, parallel to the stage

case, on account of this improper standard having been applied by the district court,²⁵⁴ but the parties reached a settlement prior to the district court's second review of the merits.²⁵⁵ Despite the fact that choreography was long denied legal protection under copyright legislation, *Horgan v. Macmillan, Inc.* demonstrates the judiciary's intent to regard choreography as an art form deserving of legal recognition.²⁵⁶ It was then up to choreographers to fully exercise their new legal rights and privileges.

IV. CURRENT ARGUMENTS FOR THE LEGAL PROTECTION OF CHOREOGRAPHY

A. *Hiding in the Wings: Why Few Sought Protection Under the 1976 Act*

Although many choreographers actively pushed for the extension of copyright protection to choreographic works, not all choreographers have received the 1976 Act with open arms. Much of this uncertainty among choreographers has stemmed from the economic aspects of copyright protection.²⁵⁷ While the actual cost of registering a work for copyright protection is low,²⁵⁸ the costs of *qualifying* for copyright protection can be much higher.²⁵⁹ Choreographers rank among the lowest-paid artists,²⁶⁰ and consequently, the current costs of fixation can be exorbitant for these artists.²⁶¹ Of course, less expensive forms of fixation, such as video, are available, but this creates a quandary for the choreographer: spend an impractical amount of money on the most accurate fixation method, or

and several feet off the ground." *Id.* The court concluded that any ordinary observer viewing this picture would know that the dancer had "jumped up from the floor only a moment earlier, and came down shortly after the photographed moment." *Id.*

254. *Horgan*, 789 F.2d at 163.

255. Lopez de Quintana, *supra* note 50, at 151.

256. See, e.g., *supra* notes 56–59 and accompanying text (discussing the historical resistance to copyright protection for choreography because it was not viewed as an important art form).

257. Abitabile & Picerno, *supra* note 55, at 53.

258. As of October 2008, the fee for copyright registration is \$45. U.S. Copyright Office—Current Fees, <http://www.copyright.gov/docs/fees.html> (last visited Oct. 14, 2008).

259. See *supra* notes 176–200 and accompanying text (discussing the high cost of some of the fixation methods available to choreographers). In fact, the copyright registration fee is only a minor consideration compared to the costs of meeting appropriate fixation standards required for copyright protection eligibility. See *id.*

260. For instance, in May 2006, choreographers earned a median of \$34,660 annually, with "[t]he middle 50 percent earn[ing] between \$21,910 and \$49,810. . . . [and] [t]he lowest 10 percent earn[ing] less than \$15,710, and the highest 10 percent earn[ing] more than \$64,070." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATION OUTLOOK HANDBOOK, 2008–09 EDITION, DANCERS AND CHOREOGRAPHERS 3 (2008), available at <http://www.bls.gov/oco/pdf/ocos094.pdf>. For a further discussion of the costs of choreographing dances and maintaining a dance company, see *infra* notes 392–97 and accompanying text.

261. See Abitabile & Picerno, *supra* note 55, at 53; see *supra* notes 176–200 and accompanying text (discussing the high costs of formal dance notation).

compromise the integrity of the creation because of an inability to pay for the most precise mode of fixation.²⁶² Additionally, copyright protection functions to provide authors with the capacity to reap the economic benefits of their creations, but many choreographers are unconcerned with this and remain “most interested in their desire to create and perform; to communicate, to the integrity of the work itself.”²⁶³ Moreover, the high cost of bringing litigation in the event of infringement deters choreographers from seeking copyright protection in the first place.²⁶⁴ Many believe that the better alternative is to rely on the traditional safeguards offered by the dance community,²⁶⁵ which some choreographers believe are far more effective than legal protections, anyway.²⁶⁶

B. *Taking the Stage: Why Choreographers Need Legal Copyright Protection*

Beyond the economic sphere, however, there are other reasons to obtain copyright protection. These reasons initially motivated many choreographers to push for greater copyright protection prior to 1976, and they continue to incentivize choreographers to obtain legal protection today.²⁶⁷ Even for those choreographers who assert that the economic benefits of copyright protection are out of sync with the concerns of most

262. Lakes, *supra* note 44, at 1856–57; see Weinhardt, *supra* note 175, at 860–61.

263. Cramer, *supra* note 73, at 155 (footnote omitted); see also Lula, *supra* note 72, at 186–87 (“[O]nly the most successful choreographers—the Balanchines of the world—are financially successful enough to realize, retain, and capitalize on the economic rights offered by the Act.” (footnote omitted)). Yet, even these successful choreographers often remain uninterested in resorting to legal protections as a means of preserving their work. For instance, George Balanchine was often asked what would happen to his ballets after his death, and he “[r]epeatedly . . . disowned any interest in his work being preserved beyond his lifetime, declaring that ballets danced by dancers he hadn’t trained, and didn’t even know, wouldn’t really be his ballets.” TAPER, *supra* note 53, at 400. In fact, Balanchine was quite benevolent in permitting others to perform his works, and “[h]e even allowed his ballets to be performed by fledgling ballerinas because he knew that the musicality and craft of his choreography would make them better dancers[.] ‘He often gave his ballets away for free, in the sense of making some kind of contribution to other companies.’” Carman, *supra* note 88, at AR28. *But see supra* notes 121–23 (citing the example of choreographer Agnes de Mille’s struggle with the unequal economic benefits received by her, as compared with composers Rodgers and Hammerstein).

264. Singer, *supra* note 68, at 296.

265. See discussion *supra* Part II.B (explaining the customary protections enforced among choreographers prior to the enactment of the 1976 Act).

266. Singer, *supra* note 68, at 296; Abitabile & Picerno, *supra* note 55, at 55.

267. See generally Lakes, *supra* note 44, at 1838–40 (discussing the various changes in the dance world and American society that have made copyright protection more desirable to choreographers).

choreographers, copyright has remained a necessary form of protection in the years since the 1976 Act for four reasons.²⁶⁸

First, American society has catapulted into the technological age, which has yielded both advantages and disadvantages to the dance community.²⁶⁹ Dance is everywhere thanks to technology, as it brings diverse forms of dance to American society through television, films, documentaries, and the Internet.²⁷⁰ However, the rise in technology and the existence of “inexpensive video recording and digital distribution of video files, have increased the ease of recording dance . . . [and] facilitat[ed] difficult-to-detect copying.”²⁷¹ In today’s age of digital piracy, there is a need for copyright protections to guard against the unauthorized copying of choreography that appears on television and the Internet.²⁷²

268. See generally Lakes, *supra* note 44, at 1838–40.

269. *Id.* at 1839. The technological boom has posed similar advantages and disadvantages for the methods available to choreographers for fixing their works and enabling them to receive copyright protection. For a discussion of these methods and their respective benefits and costs, see *supra* Part III.B.3.

270. *Id.* For instance, recordings of choreography and excerpts from ballets are readily available on video websites such as YouTube. See *supra* note 4 for an example of one such readily-available video excerpt from the ballet *Swan Lake*. Especially in recent years, the Internet has been a significant platform for the exposure of new audiences to dance and choreography. Not only have “dancers, choreographers and institutions embraced the Internet with video, blogs and new Web sites. . . . [but] [n]ow artists are using the medium as a way not just to build awareness for their work but also to change the nature of the form.” Julie Bloom, *The World of Dance Tries Out New Moves on the Web*, N.Y. TIMES, Dec. 29, 2007, at B9. One notable example of the increased cooperation between choreographers, dancers, and the Internet is the website and blog *The Winger*, launched by Kristin Sloan, a former dancer with NYCB. *Id.* The website proclaims itself as “a community oriented dance website that shows the lives, insights, and personalities of professionals, students, experts and pioneers in the dance world.” *The Winger*, <http://thewinger.com/words/about/> (last visited Oct 14, 2008). Through the posting of photos and blogs to the website by dancers and choreographers around the globe, *The Winger* “help[s] promote and popularize dance by connecting the audience to the artists in a personal and meaningful way, and opening up conversation within the site.” *Id.* The starting of websites such as *The Winger* and the rise of dance in multimedia formats is due in part to an increasing curiosity in dance and its creation. Bloom, *supra*, at B9. As Kristin Sloan has commented, “‘The dance world, particularly ballet, is very closed and isolated’ ‘It’s supposed to be mysterious, which kind of goes against everything today. There are tons of reality TV shows; people want to know what goes on behind the scenes, and what goes into creating things.’” Bloom, *supra*, at B21.

271. Lakes, *supra* note 44, at 1839.

272. *Id.* With technology constantly communicating choreography and dance to the masses, copyrights remain as important to choreographic works as they do to other media, including music and movies. See *supra* note 270. The possibility remains that choreographic works could experience a shake-up similar to that suffered by the music industry in the days of internet music downloading, thanks to the technologies distributed by software companies Napster and Grokster. See MERGES ET AL., *supra* note 39, at 593–94. Napster dramatically altered the music industry in the late 1990s with “technology [that] vastly expanded the effective storage and exchange capacity of the Internet by enabling computer users running Napster’s software to search the hard drives of thousands of other users for files encoded in the MP3 compression format commonly used for music files.” *Id.* at 593. Music-sharing among computer users began to spread like wildfire, leading the Recording Industry Association of America to “spearhead an aggressive litigation campaign against

Second, legal protection for choreography is necessary to combat the inequalities that can result from the lack of copyright safeguards.²⁷³ The most telling example of this principle is the battle of Agnes de Mille to receive benefits for her choreography in *Oklahoma!* that were on par with those received by composers Rodgers and Hammerstein.²⁷⁴ While many choreographers are not concerned with economic equality and reaping financial returns from their creations,²⁷⁵ for those who are, copyright law is essential to achieving that end, by granting to the copyright holder economic rewards for undertaking the creative process.²⁷⁶

Third, the dance community has grown rapidly since the years of the dance boom and beyond, rendering copyright an essential tool for protecting against possible infringement.²⁷⁷ For instance, “the number of nonprofit

the entire digital music distribution pipeline.” *Id.* at 591. Although copyright infringement on the scale experienced by the music industry seems a very remote possibility for the dance community, the fact that choreographic works are splashed across the Internet makes choreography just as vulnerable to such infringement. *See supra* notes 270–72 and accompanying text.

273. *See* Lakes, *supra* note 44, at 1839–40.

274. *See supra* notes 121–23 and accompanying text (describing the inequality that resulted from the fact that Rodgers and Hammerstein were able to copyright their music in *Oklahoma!* and thus reap continuing financial gains from the production of their work, while Agnes de Mille received only a flat fee for the production of her choreography).

275. *See supra* note 263 and accompanying text (explaining that choreographers are traditionally not motivated by money).

276. *See supra* notes 201–28 (discussing the rights and economic rewards granted to those who seek copyright protection for their creations); Lakes *supra* note 44, at 1839–40.

277. *See* Lakes, *supra* note 44, at 1838–40. The growth of the dance community and dance companies in America since the dance boom has not been without its challenges. Some of the most dramatic events that stifled the further growth and spread of dance in America were related to a lack of financial support. *See* NAT’L ENDOWMENT FOR THE ARTS, *supra* note 109, at 3. For example, the NEA Dance Touring Program, which enabled many companies to take their choreography on tour, was terminated in 1983, making it almost impossible for some groups to even entertain the idea of touring. *Id.*; *see also supra* note 116 and accompanying text (discussing the creation of the NEA’s Dance Touring Program). In the years following, many of the dance world’s most famous choreographers died, including George Balanchine, Martha Graham, and Jerome Robbins, among others. Kisselgoff, *supra* note 107, at E1. The dance world was also devastated by the outbreak of the HIV/AIDS epidemic, which “would decimate the nation’s cultural landscape and rob the dance world of performers, choreographers, managers, critics, costume and set designers, and supporters.” NAT’L ENDOWMENT FOR THE ARTS, *supra* note 109, at 3. And in another damaging blow, the nation slipped into an economic recession in 1990–91, which led to drastic cuts in funding to dance companies. JOHN MUNGER, DANCING WITH DOLLARS IN THE MILLENNIUM: WHO’S MOVING AHEAD, WHO’S FALLING BEHIND, AND WHY 4 (2001). The recession reared its ugly head on the profits of dance companies, as sixty-five percent of companies reported ending 1990 with a profit, while only forty-five percent reported making a profit in 1991. *Id.* Beginning in 1995, Congress no longer permitted the NEA to award individual grants to choreographers and “[t]he NEA budget was cut from \$175.9 million in 1992 (its highest level) to \$99.5 million in 1996.” NAT’L ENDOWMENT FOR THE ARTS, *supra* note 109, at 4. Where grants from the NEA once comprised 7.6 percent of an

dance companies grew by 93 percent” from 1987 to 1997.²⁷⁸ Moreover, the number of nonprofit dance companies with budgets of at least one million dollars reached seventy-six in September 2006.²⁷⁹ The number of choreographers in the United States is similarly on the rise, with an expected six percent growth between 2006 and 2016.²⁸⁰ Thus, whereas the dance community was once small enough that self-regulation through traditional community customs could easily be achieved,²⁸¹ new choreographers entering this field may not be as “likely to follow formerly accepted rules.”²⁸²

Finally, copyright protection is essential for the long-term preservation of the art form and its creation.²⁸³ Since “[a] choreographer’s most valuable assets are the dances he or she creates,”²⁸⁴ copyright is not only a vital safeguard against copying by others; it is also a way of protecting the dances at their status quo.²⁸⁵ Presently, one of the more popular and simple means

average dance company’s budget, that number was cut to 2.5 percent. *Id.* Moreover, several members of Congress attempted to eliminate the NEA outright, led by Senator Jesse Helms, in response to the creation of arts with questionable and controversial subject matters. MUNGER, *supra*, at 4. Amid these challenges, some were quick to pronounce the end of the dance boom, but others were not so willing to accept the end of this era, such as Martha Graham, who was asked in the mid-1980s if dance was dead, causing her to respond, “I’d say it’s just kicking up its heels.” Anna Kisselgoff, *Has the Dance Boom Run Its Course*, N.Y. TIMES, Mar. 3, 1985, at H1. After exploring the possible end of the dance boom in the 1980s, Kisselgoff most recently declared in 2005 that the dance boom of the 1960s and 1970s had indeed ended. Kisselgoff, *supra* note 107, at E1. However, Kisselgoff has asserted that dance itself is not over, observing that “any art form is greater than a single individual, be it choreographer or superstar. We are in an interlude waiting for the next boom. In the end is the beginning.” *Id.*

278. NAT’L ENDOWMENT FOR THE ARTS, *supra* note 109, at 5. Nonprofit dance companies are those companies which are not owned by a single person and are not subject to corporate income tax. MUNGER, *supra* note 277, at 5. It is interesting to note that once a dance company is recognized as a nonprofit, “it really belongs to the community, and that’s why members of the community sit on the board of directors, albeit as volunteers.” *Id.* This comports with the underlying principles of copyright law, in which copyrights protect creations for the purpose of benefitting communities and the public as a whole. *See supra* notes 42–46 and accompanying text (explaining the general purpose of copyright law).

279. Dance/USA—National Statistics, http://www.danceusa.org/facts_figures/national.htm (last visited Oct. 14, 2008). Of these seventy-six companies in existence, fifty-eight were ballet companies and eighteen were modern dance companies. *Id.*

280. BUREAU OF LABOR STATISTICS, *supra* note 260, at 2.

281. *See* discussion *supra* Part II.B (presenting the traditional protections adopted by choreographers to safeguard their creations).

282. Lakes, *supra* note 44, at 1838–39. Lakes notes that choreographers are “[n]o longer able to rely on the tight-knit nature of their artistic community for protection of their right to control the presentation of their works, [and they] . . . must now look elsewhere.” *Id.* at 1839–40.

283. *See* discussion *supra* Part III.B.3 (explaining the means of fixation available to choreographers and the ways these methods preserve dance).

284. Lula, *supra* note 72, at 178 (footnote omitted).

285. *See* Solway, *supra* note 151, at AR1. When asked about his plans for his choreography upon his death, choreographer Paul Taylor responded,

“I don’t care frankly . . . I won’t be here to see the dances which I enjoy, so what does it

of preserving dance is through memory.²⁸⁶ Dancers who have worked with the original choreographer and danced a role in the piece can pass the choreography onto the next generation of dancers, if the choreographer is no longer in the position to do so.²⁸⁷ This mode of communication is often preferable, as the current means of recording choreography are often criticized for their shortcomings.²⁸⁸ But more importantly, “[d]ance is people-intensive. It is created by people, administered by people, delivered by people, and cannot be stocked on shelves like manufactured objects because it lives in the skills, hearts and minds of people,” so it is logical that people would be the primary conduits for the art.²⁸⁹ However, memory is an imperfect form of preservation and copyright law requires fixation, thereby enabling choreography to be memorialized in a more permanent mode of conservation.²⁹⁰

C. *The Current Debates*

The current trend in legal commentary on the issue of copyrighting choreography is to argue that copyright laws fall short of adequately protecting choreography, particularly as compared with the law’s protections of other art forms.²⁹¹ This has resulted in many legal scholars calling for the

matter to me? . . . But I thought as long as the dancers want to do these things and the public wants to see them, I should try to cooperate. I feel a certain responsibility and I’m not ashamed of a lot of these dances, so I thought I should make some effort to see that they can continue.”

Id. The issue of preservation of choreography through the use of copyright law is an interesting one, and one that is the subject of varying opinions from different choreographers. While Taylor believes that preservation is advantageous, provided that dance consumers continue to want to see performances of his work, others are more skeptical of the perpetual existence of their works. *Id.* Choreographer Lar Lubovitch noted:

“Whether or not . . . [dance] is or ever was a preservable art is a big question. This is the greatest dilemma facing preservers of dance. It hasn’t been allowed to mutate. But we don’t see old dances in the context of their times, we see them in the context of our times.”

Id. Moreover, it was George Balanchine who said in regard to the preservation of his dances, “[n]ow is when [the works are] beautiful.” Swack, *supra* note 52, at 267 (footnote omitted).

286. See *supra* notes 80–84 and accompanying text.

287. See *supra* notes 80–84 and accompanying text.

288. See discussion *supra* Part III.B.3 (discussing the current methods of fixation and notation of dance available to choreographers and their respective advantages and disadvantages).

289. MUNGER, *supra* note 277, at 7–8.

290. See *supra* Part III.B.3 (describing the legal requirements of fixation).

291. See *infra* notes 298–310 and accompanying text.

amendment of copyright laws.²⁹² These proposed changes fall into three major categories: (1) that the definition of “choreographic works” should be altered;²⁹³ (2) that fixation requirements should be loosened, or waived altogether, for choreographers;²⁹⁴ and (3) that dance community protections and/or moral rights should be integrated in copyright law.²⁹⁵ In fact, writers seem to be asking for anything to make it easier and more efficient for choreographers to obtain copyright protection under the law.

The first group of commentators generally faults Congress for not crafting a statutory definition for “choreographic works,”²⁹⁶ and argues that *Compendium II*’s definition of “choreographic works”²⁹⁷ is too general and leaves some forms of choreography outside the realm of copyright protection.²⁹⁸ For instance, author Katie Lula argues that the definition of “choreographic works” should be formulated by dancers and audience members.²⁹⁹ Joi Lakes postulates that a definition of “choreographic works” must be more specific and must focus on the “expression” and “flow” of choreographic movements.³⁰⁰ Ultimately, these critics agree that the definition of choreography provided by *Compendium II* leaves much to be desired.³⁰¹

The second set of opinions maintains that the current legal requirements for fixation are too inhibiting and preclude many choreographers from seeking the legal protection that they deserve.³⁰² Lauren Cramer contends

292. See *infra* notes 298–310 and accompanying text.

293. See *infra* notes 298–300 and accompanying text.

294. See *infra* notes 302–07 and accompanying text.

295. See *infra* notes 308–10 and accompanying text.

296. See *supra* notes 156–58 and accompanying text.

297. See *supra* notes 159–61 and accompanying text (discussing “choreographic works,” as defined by *Compendium II*).

298. See Lula, *supra* note 72, at 190–91 (arguing that the definition of “choreography” is too narrow, and that the better solution would be to leave the framing of the definition to the dancers and audiences who are best familiar with it); Cramer, *supra* note 73, at 147–48 (noting that the definition is too narrow and does not comport with the traditional definitions of choreography understood by those in the dance community); Hilgard, *supra* note 51, at 785–88 (arguing that the definition of choreography must be clarified and refined in order to better determine the occurrence of infringement of choreographic copyrights); Lopez de Quintana, *supra* note 50, at 153–54 (arguing that the current definition is ambiguous as to whether choreographers using social dance steps in their creations and those who create dances lacking a story would be entitled to copyright protection); Wallis, *supra* note 50, at 1452–55 (arguing that the definition of “choreography” is far too simple and vague to cover the complexities of choreography and thereby fails to provide proper copyright protection for choreography under the law).

299. Lula, *supra* note 72, at 191.

300. Lakes, *supra* note 44, at 1858.

301. See *infra* notes 159–61 and accompanying text.

302. See Cramer, *supra* note 73, at 160 (arguing that there should be a general exception for choreographers to meet the fixation requirement in order to obtain copyright protection); Forcucci, *supra* note 156, at 968 (noting that current fixation standards are too expensive for most choreographers to meet and that there should be more inexpensive alternatives or a general exception

that fixation is not needed for the protection of choreographic works, since choreography can be communicated and reproduced through other means, and that choreography should receive an exception to the fixation requirement.³⁰³ Likewise, Leslie Erin Wallis contends that the United States should adopt provisions similar to German copyright laws, which provide that a work is fixed from the time of its creation.³⁰⁴ Lakes recommends that Congress should alter its fixation requirements for choreographic works, suggesting that fixation should only be required for the elements of “expressive movement and flow.”³⁰⁵ Lula maintains that the fixation requirement should be retained and that choreographers should receive government funding so that they may employ current fixation technologies.³⁰⁶ In a unique argument, Thomas Overton asserts that “fixation through inexpensive filming” should be accepted as an adequate means and that courts should permit such films to be accompanied by expert testimony in infringement cases.³⁰⁷ Thus, these commentators would generally like to see some flexibility in fixation standards for choreographers.

In the final group of arguments, several writers have supported the incorporation of the traditional protections of the dance community, and even moral rights principles, into copyright law.³⁰⁸ Barbara Singer

to fixation); Lakes, *supra* note 44, at 1859–60 (contending that fixation standards should be more flexible for choreographers, requiring only that the movement and flow of the choreography be fixed rather than every complete detail); Lopez de Quintana, *supra* note 50, at 171 (arguing that there should be an exception to the fixation requirement for choreographers); Lula, *supra* note 72, at 194 (maintaining that choreographers should receive financial assistance from the government for the purposes of affording the fixation methods currently available); Thomas J. Overton, *Unraveling the Choreographer’s Copyright Dilemma*, 49 TENN. L. REV. 594, 615–16 (1982) (arguing that expert testimony should be permitted in infringement cases to neutralize the inadequacies of fixation by film, which is more cost-effective for choreographers); Wallis, *supra* note 50, at 1462, 1470 (noting that choreographers should be granted an exception to current fixation requirements by adopting fixation standards similar to German copyright law, which considers a work fixed at the time of its creation).

303. Cramer, *supra* note 73, at 160 (“[F]ixation is not needed in dance . . . [because] [a]n original choreographic work is capable of being perceived, reproduced, or otherwise communicated through the dancer’s movements and expressions.”).

304. Wallis, *supra* note 50, at 1462, 1470–71.

305. Lakes, *supra* note 44, at 1860. Lakes suggests that the fixation requirement should be altered to state, “Choreographic works may be fixed in any tangible form from which they can be perceived and recognized. Protection is limited to the expressive movement and flow, as depicted in the fixed copy.” *Id.*

306. Lula, *supra* note 72, at 194.

307. Overton, *supra* note 302, at 615–16.

308. See Singer, *supra* note 68, at 318–19 (arguing that since it is unlikely that moral rights provisions will be adopted into American copyright law, a better alternative would be for

maintains that “as long as American choreographers believe in and abide by their self-imposed customary rules, the custom of the dance community will indeed continue to offer the best means of recognizing and protecting the artistic rights of American choreographers.”³⁰⁹ Additionally, at least one legal commentator, Krystina Lopez de Quintana, has proposed that Congress extend greater moral rights protection to choreographers, in addition to the legal protections of copyright law.³¹⁰ On the most basic level, authors falling into this category advocate greater protection of choreographers’ moral and artistic rights by copyright law. While many of these arguments have some merit and raise considered points, enacting any one of these propositions would likely transform copyright law into a body of jurisprudence that does not conform with its philosophical and constitutional underpinnings.³¹¹

V. STAYING ON BALANCE: WHY COPYRIGHT LAW SHOULD NOT PLIÉ³¹² IN FAVOR OF CHOREOGRAPHERS

The vast majority of legal writers commenting on copyright law and choreography have recommended that the current laws be modified to encourage more choreographers to seek copyright protection and to accommodate the interests of these artists.³¹³ Altering copyright statutes, however, would throw off the current balance of the law to the point that it would no longer strike a middle ground between granting exclusive rights to artists, thereby encouraging the creation of works beneficial to the public, and discouraging creation by removing too much from the public domain.³¹⁴ As such, copyright laws should not be adjusted to make it easier for

choreographers to continue to rely on traditional community customs of protection, which provide some protection for artistic rights); Forcucci, *supra* note 156, at 967–68 (maintaining that integrating dance community protections in copyright law is a more effective means of encouraging such artists to obtain legal protection); Lopez de Quintana, *supra* note 50, at 168–72 (claiming that the introduction of moral rights into American copyright law would better protect the rights of choreographers).

309. Singer, *supra* note 68, at 319.

310. Lopez de Quintana, *supra* note 50, at 168–72.

311. See *supra* notes 42–46 and accompanying text (explaining the constitutional rationale behind American copyright law).

312. In French, the verb “plier” means “to bend.” WordReference.com, Dictionnaire Francais-Anglais, <http://www.wordreference.com/fren/plier> (last visited Nov. 11, 2008). In classical ballet technique, a plié is “a bending of the . . . knees.” See Ballet Dictionary, <http://www.abt.org/education/dictionary/index.html> (follow “Plié” hyperlink under “Ballet Dictionary”) (last visited Oct. 14, 2008).

313. See *supra* Part IV.C (providing an overview of the various arguments of legal writers on the topic of copyright law and choreography).

314. See *supra* note 44 and accompanying text (describing copyright law and its philosophical purposes as a delicate balance); see also *supra* Part III.A (describing the importance of restrictions on copyrightable material to the preservation of the public domain).

choreographers to obtain protection. Nor should the statutes be modified to make the process more difficult. For now, the perfect balance has been achieved. This is not to say that copyright laws are inherently flawless, but these minor faults can be resolved through means other than statutory amendment. To maintain the ideal balance, copyright law should remain as it is currently written, for any measures to change the law to make it easier for choreographers to obtain protection will likely subvert the intended purposes of the law.³¹⁵

A. Keeping the Statutory Language of Copyright Protection On Balance

1. Choreographic Works

“Choreographic works,” as currently defined by *Compendium II*,³¹⁶ should not be characterized more specifically, as many legal commentaries recommend.³¹⁷ Critics tend to disapprove of this particular definition of “choreographic works,” claiming that such a classification does not embrace the full aspects of choreography and that it is unnecessarily ambiguous.³¹⁸ However, it is almost undeniable that choreography is a multifaceted art form,³¹⁹ so perhaps it is necessary to have an arguably broad and vague definition. Choreography comes in various shapes and forms, and the possibilities for creativity are endless.³²⁰ By crafting a less specific characterization for choreography, the Copyright Office has generated a definition that can be flexibly applied to the innumerable choreographic forms that exist.³²¹ Additionally, a more pliable understanding of

315. See *supra* notes 42–46 and accompanying text (discussing the philosophical underpinnings of copyright law in America).

316. See *supra* notes 159–61 and accompanying text (explaining *Compendium II*'s definition of “choreographic works,” as framed by the United States Copyright Office).

317. See *supra* notes 298–300 and accompanying text (presenting commentaries on *Compendium II*'s current definition of “choreographic works” by various critics).

318. See *supra* notes 298–300 and accompanying text (describing the critical views of the definition of “choreographic works” under *Compendium II*).

319. See Wallis, *supra* note 50, at 1455 (noting that “[c]horeography is much more complex than Congress would lead us to believe”).

320. A striking example of the various shapes and forms of choreography can be seen in the dances created by the Pilobolus Dance Theater, a dance company that expresses movement through an “innovative, witty blend of gymnastic-acrobatic-dance movements—linking bodies in novel configurations—[which] evolve and explode into a seemingly endless variety of shapes.” Gwin Chin, *Collaboration Is Still What Holds Pilobolus Together*, N.Y. TIMES, Jan. 25, 1987, at H22.

321. In a survey of approximately sixty professionals associated with the dance world, all agreed that “[d]ance in this country was once categorized as ‘ballet,’ ‘modern,’ and ‘other,’ but there is now recognition of both the importance of diversity and the frequent blurring of boundaries between

choreographic works encourages artists to feel less constrained and supports the creation of new works that will further the benefit of the public and the purposes of copyright law.³²² A more tailored definition would likely stall creativity and push courts to scrutinize choreography and potentially its aesthetic merits in detail, which is not an appropriate role for the judiciary or in the best interests of choreographers.³²³ This could result in some creative choreography being excluded from the law's protection merely because it lays outside the bounds of the conventional choreography to which the courts may be accustomed.

Construing this definition of choreographic works too broadly would not be ideal either, as Joi Lakes notes in her law review commentary.³²⁴ Extending copyright protection to anything that could be even remotely construed as a "choreographic work"³²⁵ would pose a damaging threat to the future of choreographic creativity.³²⁶ Too much material would be deemed

forms that were previously viewed as unambiguously different." ROMALYN TILGHMAN, *EAVESDROPPING ON DANCE DIALOGUES 2* (2006), available at <http://www.danceusa.org/pdf/DukeDialogues.pdf>. To accommodate these new approaches to dance, then, it is necessary to have a pliable definition of choreographic works, especially if the suppression of creativity is to be avoided. See *id.* (noting that "[t]he diversity of forms leads to the creation of yet more forms, as artists explore, cross over, fuse, morph, and collaborate").

322. History has already recognized the importance of encouraging creativity through uninhibited expression, particularly in the context of those activities protected under the First Amendment. For instance, in the landmark case of *New York Times Co. v. Sullivan*, Sullivan was an elected commissioner in Alabama who brought a libel suit against the *New York Times* for the printing of certain statements in an advertisement. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). In addressing whether the newspaper could be held liable for any false statements made in this advertisement, the Supreme Court of the United States held that there could be no liability unless it was shown that these statements were printed with knowledge that they were false. *Id.* at 279–80. The Court reasoned that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'" *Id.* at 279. Moreover, the Court favored the newspaper based on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. While choreographic works are typically not on the same level as the discussion and debate of important public issues, an analogy can be drawn between copyright law and free speech issues. As in copyright law, protecting the First Amendment rights of the press and the benefits the exercise of those rights brings to the public requires finding a balance between commenting on such public issues and making libelous attacks. *Id.*

323. Lula, *supra* note 72, at 187 ("[T]he dance community worries that by requiring copyrightable works to promote the 'useful arts,' legislators and courts might be tempted to 'judge the moral worth of choreographic works.'" (footnote omitted)); Lakes, *supra* note 44, at 1842–43 (observing that choreographer Agnes de Mille "express[ed] a distrust of judges' ability to determine the 'creative original value' of dance." (footnote omitted)); Singer, *supra* note 68, at 299 ("[J]ust as choreographers shrink from the notion of any application of arbitrary standards of difficulty to their works, they also abhor any legal judgment of the morality of their works.").

324. Lakes, *supra* note 44, at 1840, 1857–59.

325. See *infra* notes 369–82 and accompanying text (discussing the current trend of attempting to copyright sports and athletic moves as choreographic works).

326. See Lakes, *supra* note 44, at 1840–41, 1858–59.

“off-limits” and removed from the public domain, leaving choreographers to work harder than ever to create something that is original.³²⁷ Consequently, such a result could discourage choreographers from even trying to develop new works, thereby completely undermining the intentions of copyright protection.³²⁸

Fortunately, the current interpretation of the term “choreographic works” finds the appropriate middle ground between these two extremes. Although *Compendium II*'s definition³²⁹ may arguably be broad, this definition has proven to be workable over the past twenty years. Moreover, the application of copyright protection to choreography has been successful for many choreographers and there has been no indication that the courts are abusing this definition to extend protection to undeserving choreographic works.³³⁰ Thus, the current definition of choreographic works should be left untouched.

It may seem that an effective solution would be to allow dancers and audience members to develop their own definition of “choreographic works,” as Katie Lula suggests in her legal commentary.³³¹ After all, dancers and choreographers are in a much better position than legislators and

327. See *id.* at 1858 (noting that “a definition should not have the unintended effect of improperly shrinking the public domain”); see *id.* at 1840 (“If all creative materials were eligible for ownership, authors would constantly seek injunctions to stop others from utilizing material which had previously been used by all as a creative base. Transaction costs would drive up the cost of innovation to a point where it would eventually become inefficient to create.” (footnotes omitted)). Lakes seems to describe such a risk in the context of removing steps from the public domain that were once part of the “creative base,” similar to the notion of copyrighting basic dance steps or individual words, thereby removing those words or steps from use by others. See discussion *supra* Part III.A (discussing the rationale of prohibiting the copyrighting of individual words and dance steps so as to keep those materials in the public domain). However, a similar phenomenon will result and extend beyond basic dance steps if too many copyrights are granted. While the over-granting of copyrights will not have an effect on the basic dance steps that are rightfully exempted from copyright protection, such an occurrence will remove from the public domain those steps that may not be basic but that are nevertheless frequently used by numerous choreographers, thereby limiting creation.

328. See *supra* notes 42–46 and accompanying text (explaining the constitutional purposes of copyright law).

329. See *supra* notes 159–61 and accompanying text (explaining the definition of “choreographic works” crafted by the United States Copyright Office in *Compendium II*).

330. But see *infra* notes 369–82 and accompanying text (discussing the efforts by some to copyright athletic moves and exercise routines as choreographic works). Although these efforts have been made, the courts have not yet conclusively permitted copyright law to be abused in this manner, suggesting only that it may be possible for certain athletic moves to be copyrightable. See *id.*

331. Lula, *supra* note 72, at 191 (arguing that the most “admirable” definition of choreography is one that “leaves the final decision about what is and what is not dance—and thus what is and is not copyrightable—to the people with the most at stake: the dancers and their audiences” (footnote omitted)).

judges to bear such a responsibility, being well-versed in the craft.³³² Yet, as new dancers and choreographers emerge, the definition fashioned by the prior generation will likely change to reflect new perspectives and opinions on this matter. As a result, a remedy of this sort would create inconsistency, by failing to give the law a solid, static standard to apply to choreography. To maintain stability and balance, it is necessary to keep control of this task in the hands of those who are familiar with the law and the ways in which it should be applied. Should the Copyright Office decide that its definition of “choreographic works” does indeed need some updating, or Congress decides to include such a definition in the copyright laws, control over the definition should remain in the hands of the Copyright Office or Congress, while perhaps obtaining input from dancers and choreographers on how the definition should be worded.³³³

Additionally, legal commentators have faulted *Compendium II*'s definition of choreography³³⁴ for excluding social dance steps and other basic steps from protectable choreography.³³⁵ The Copyright Office clearly notes, however, that while social dance steps cannot be copyrighted individually, a choreographic piece that incorporates such basic steps is not excluded from protection merely for employing these moves.³³⁶ By drawing a pivotal comparison with the copyrighting of individual words in literary works,³³⁷ the Copyright Office broadens rather than restricts what is protectable as choreography. Just as individual words are essential to the writer and should not be copyrighted and taken away from others who wish to use those words in their own creations, so too should basic and popular steps be kept in the public domain for other choreographers to use.³³⁸ Thus, not extending copyright protection to social dance steps and basic moves enhances the tools with which choreographers can create and maintains the

332. See *id.* (recommending that dancers and audience members be responsible for defining “choreography” for the purposes of copyright protection).

333. See *id.*

334. See *supra* notes 159–61 (discussing *Compendium II*'s classification of “choreographic works”).

335. See Wallis, *supra* note 50, at 1454 (“[T]he exception for social dance steps is inappropriate because it may limit copyright protection of choreographic works in a manner not intended by Congress.”); see Lopez de Quintana, *supra* note 50, at 154 (arguing that the exclusion of social dance steps may inhibit the creativity of choreography).

336. U.S. COPYRIGHT OFFICE, *supra* note 159, § 450.06.

337. See *supra* note 161 and accompanying text (noting that “individual ballet steps . . . may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material”).

338. See *supra* notes 136–42 and accompanying text (discussing the public domain and the effect of copyrights on the amount of material included in the public domain). See also Lakes, *supra* note 44, at 1845.

necessary balance between rewarding artists' creativity with exclusive rights and keeping the public domain from becoming overly-restrictive.³³⁹

2. Fixation

Due to the high costs of accurate fixation, writers contend that the fixation requirements for choreographic works should be altered, or waived altogether.³⁴⁰ Loosening the current criterion for fixation to make it easier for choreographers to obtain copyright protection may, at first blush, seem beneficial. Despite the immediate benefits, relaxing the fixation requirements and over-simplifying the process would undermine the purposes of copyright law in the long run by making it too easy to obtain copyrights and removing too much from the public domain.³⁴¹

Although establishing a general exception to the fixation requirement³⁴² may seem like a plausible solution to the challenges facing choreographers, this solution is not feasible. Fixation is a constitutional requirement that cannot merely be disposed of for certain categories of copyrightable material, as suggested by the United States Supreme Court in *Goldstein v. California*.³⁴³ In *Goldstein*, the Court noted that fixation is an absolute prerequisite to copyright protection, manifested by the Founders in the Copyright Clause as protection for the "Writings" of "Authors."³⁴⁴ However, the Court reasoned that the fixation requirement could "be interpreted to include any physical rendering of the fruits of creative

339. See *supra* notes 44, 128–35 and accompanying text (explaining the give and take between granting protection and leaving enough uncopyrighted material in the public domain to be used by others).

340. See *supra* notes 302–07 and accompanying text (discussing the criticisms of the current fixation methods available to choreographers).

341. See *supra* notes 42–46 and accompanying text (discussing the general purposes of copyright law as a means of encouraging artists to create for the benefit of American society).

342. See *supra* notes 302–03 (noting that several commentators have advocated for the complete elimination of the fixation requirement in the copyrighting of choreographic works).

343. MERGES ET AL., *supra* note 39, at 404 (noting that the Court "has indicated that fixation is a constitutional requirement based on the Founders' use of the term 'Writings' in Article I, Section 8, Clause 8" (citing *Goldstein v. California*, 412 U.S. 546, 561 (1973))). In *Goldstein*, the defendants were charged with copying and selling unauthorized music recordings. *Goldstein*, 412 U.S. at 548. The charges were brought against defendants under a California statute that made it a misdemeanor to "[k]nowingly and willfully transfer or cause to be transferred any sounds recorded on a phonograph record, . . . with intent to sell or cause to be sold, . . . such article . . . without the consent of the owner." *Id.* at 549 n.1. The defendants argued that the California statute was unconstitutional because it conflicted with several tenets of the 1909 Copyright Act, but the Court disagreed and upheld the California statute as constitutional. *Id.* at 551, 571.

344. *Goldstein*, 412 U.S. at 561–62; see also MERGES ET AL., *supra* note 39, at 404.

intellectual or aesthetic labor.”³⁴⁵ Congress may freely alter its interpretation of fixation, but it would be unconstitutional to completely discard this requirement.³⁴⁶ Moreover, completely removing the fixation requirement would be harmful to the litigation of infringement actions.³⁴⁷ Primarily, fixed copies of protected works serve an evidentiary function, providing necessary proof in infringement contests.³⁴⁸ As such, if choreographers were deprived of fixation, and thus evidentiary support, they would be severely crippled in defending their rights and would have little reason to seek copyright protection in the first place.³⁴⁹

A stronger argument can be made for simply altering the fixation requirement, making it easier for choreographers to more accurately meet fixation standards.³⁵⁰ In particular, Joi Lakes makes an interesting case for the reform of choreographic fixation, contending that fixation should be required only for the expressive and flow movements of choreographic works.³⁵¹ She maintains that “[t]he fixed form of a choreographic work should thus be seen as a plan which necessarily does not and cannot embody all the nuances of a choreographic work. As long as it depicts the movement and flow of the piece, it should suffice.”³⁵²

345. *Goldstein*, 412 U.S. at 561.

346. *Id.* at 561–62.

347. *See Lakes*, *supra* note 44, at 1859; *see MERGES ET AL.*, *supra* note 39, at 405.

348. *Lakes*, *supra* note 44, at 1859; *MERGES ET AL.*, *supra* note 39, at 405. Professor Merges provides the example that “[i]f any expression could be copyrighted, the law might face a large number of frivolous infringement suits that would be virtually impossible to verify—along the lines of ‘I gave them the idea (or rather the expression of the idea) for that book!’” *Id.* Expanding on this principle, one legal writer notes that if an author intends to produce an unpublished work—as most choreographers do—then under the Code of Federal Regulations, only a “complete copy” of the work is required to be submitted, as opposed to a “best edition.” *Weinhardt*, *supra* note 175, at 855–56. While a “best edition” of the work must be of the “highest quality” and must conform to strict standards, a “complete copy” needs only to “merely . . . incorporate the copyrightable elements of the work being copyrighted.” *Id.* at 856. Thus, employing a more flexible standard means that choreographers whose works are performed, rather than published “need only worry about capturing enough of the dance elements to fix the copyrightable content in a ‘complete copy.’” *Id.* at 858 (footnote omitted).

349. *See Weinhardt*, *supra* note 175, at 850–51 (“[I]f a choreographer plans to initiate a suit against potential infringers, then it becomes more important to fix the work in a way that works well as evidence in court. . . . In determining what this method should be, the . . . [Copyright Office] should keep in mind that a fixation method that is too complex, too expensive, or not sufficiently comprehensive may discourage choreographers from using statutory copyright protection.” (footnote omitted)).

350. *See supra* notes 302–07 and accompanying text (explaining the current criticisms of the fixation requirement of copyright law).

351. *Lakes*, *supra* note 44, at 1859–60. *Lakes* proposes that the statutory language for fixation be adjusted to state, “Choreographic works may be fixed in any tangible form from which they can be perceived and recognized. Protection is limited to the expressive movement and flow, as depicted in the fixed copy.” *Id.* at 1860 (internal quotes omitted).

352. *Id.* at 1859.

While such an interpretation of the fixation requirement seems ideal, there are several problems with this line of reasoning. First, this understanding of the fixation requirement necessarily depends on Lakes's argument that the definition of "choreographic works" also be adjusted to reflect the qualifying factors of expression, flow, and movement.³⁵³ However, as previously stated, altering the definition of "choreographic works" in this manner would serve neither choreographers nor the goals of copyright law.³⁵⁴ Second, if the interpretation of fixation rests only on flow and expression, then arguably a great many things that are clearly not "choreographic works" could meet this standard and thus qualify for a copyright.³⁵⁵ The result would be an ever-increasing number of copyrights awarded and more material being extricated from the public domain, posing a threat to future creation.

In the end, a balance must be maintained in the fixation realm of copyright law as well, and the legal requirements must not be altered too prematurely. Any challenges that choreographers currently experience with fixing their works, due to a lack of technological means that are both affordable and accurate, will be resolved by the natural progress of society.³⁵⁶ It is certain that new methods and technologies for fixation will emerge in the next few years to facilitate the recording of dance.³⁵⁷ The current challenges associated with preserving dances will likely even propel

353. *See id.* at 1858.

354. *See supra* notes 42–46 and accompanying text (explaining the objectives of copyright law as envisioned and enacted by the Founders).

355. *See infra* notes 369–82 and accompanying text (discussing the current trend of seeking copyright protection for athletic and sports moves, such as yoga positions, by labeling them as "choreographic works").

356. A similar argument has been raised in the context of patent legislation reforms. Several commentators have maintained, "Congress should not overlook the surprising ability of self-correcting forces in the patent system and elsewhere to adapt to change in ways less susceptible to the unintended, negative consequences of the blunt-force—and heavily lobbied—legislative process." Claude Barfield & John E. Calfee, *Congress's Patent Mistakes*, WALL ST. J., Oct. 29, 2007, at A18. Ultimately, Barfield and Calfee caution that prior to altering the legislative landscape of patent law, "Congress should remember that its past reforms have often spawned new problems." *Id.*

357. As one writer has observed, "Today's computer technology can make important contributions to the inherently visual art of dance, and dance contributes to the evolution of technology, as it did with film." Dunning, *supra* note 200, at E1. In fact, groundbreaking uses of technology in dance are already being employed. For instance, Merce Cunningham not only relies on computers to fix much of his choreography in tangible form, but now he is turning to the Internet as a teaching method. Julie Bloom, *An Old Mentor's New Medium*, N.Y. TIMES, Jan. 20, 2008, at AR7. Cunningham will feature "Mondays with Merce," providing viewers with "an online video program featuring weekly episodes of Mr. Cunningham's Monday class, on its Web site, merce.org." *Id.*

the development of enhanced technological fixation methods, as society becomes increasingly immersed in both dance and technology.³⁵⁸ The emergence of computer programs that support dance notation will continue to improve and become more affordable, just as other technologies, such as computers and cameras, constantly improve and decrease in cost.³⁵⁹ However, if fixation requirements are weakened prior to this technological progression, then by the time technology catches up, it will be so easy for choreographers to fix their works and obtain copyright protection that there will be an influx of copyrights sought and granted.³⁶⁰ Thus, in order to maintain the proper balance, choreographers may need to make minor sacrifices and rely on inexpensive, but less accurate means of fixation for the sake of obtaining copyright protection.³⁶¹ As one writer explains, fixation via film “may be a compromise for the choreographer . . . [but] [i]f the choreographer desires effective legal protection in the long run, . . . he must surrender some amount of perfection in capturing the totality of the work.”³⁶²

3. Further Impact of Creating Statutory Exceptions for Choreography

Beyond making it easier to obtain copyright protection, and consequently limiting both the incentives and materials with which choreographers can create, altering the requirements of copyright law would

358. See *supra* notes 269–72 and accompanying text (discussing the increasing presence of dance and technology in American society and the relationship between these two forms); Weinhardt, *supra* note 175, at 849–50 (“As technology increases and as economies of scale bring down prices for these new technologies, the fixation problem may no longer be a compromise between a standard which is accurate for choreographers or one which provides sufficient evidence for an infringement action in court.”); see also Lula, *supra* note 72, at 193.

359. See *supra* note 192 and accompanying text (discussing the Benesh Notation Editor computer program, which assists choreographers to formally notate their choreography on their own computers).

360. See, e.g., *supra* note 356 and accompanying text (observing that the purposes of copyright law will be compromised if the statutory language is made too flexible and providing a similar parallel in the context of patent law).

361. George Balanchine was one of the greatest choreographers of the twentieth century, who also relied on video technology to obtain copyrights for many of his ballets. See, e.g., *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 158 (2d Cir. 1986) (noting that to obtain his copyright on *The Nutcracker*, Balanchine relied on a videotaped dress rehearsal of the ballet to meet the fixation requirement). If Mr. Balanchine found video technology to be a sufficient means of fixation, then why are today’s choreographers so offended by the use of this cost-effective means of fixation?

362. Weinhardt, *supra* note 175, at 861. Should choreographers be unable or unwilling to meet the fixation requirement and forgo formal, legal copyright protection, they are not left completely defenseless. As noted in the House Report to the 1976 Act, fixation “not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection.” H.R. REP. NO. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665. Thus, choreographers who decide not to seek copyright protection could obtain common law copyright protection. MERGES ET AL., *supra* note 39, at 405.

have broader, sweeping effects. Such alterations will affect not merely those who create dances, but they will also impact the lives of those associated with the production and performance of choreographic works. Moreover, simplifying the copyright process may enable non-choreographic works, masquerading as choreography, to slip under the law's protection.³⁶³

One ramification of oversimplifying the process of obtaining copyright protection is that if too much material is protected, choreographers will lack incentives to create new pieces as a result of a shrinking public domain,³⁶⁴ and there will consequently be fewer jobs for dancers. The job market for professional dancers in America is very competitive and “[e]mployment of dancers and choreographers is expected to grow more slowly than the average for all occupations.”³⁶⁵ Although various openings seem to arise quite often due to dancers and choreographers retiring or not being able to work due to injuries or other personal reasons, there are consistently more dancers and choreographers than there are jobs available to them.³⁶⁶ This situation would not be helped by weakening copyright laws, which would enable more choreographers to obtain protection in the first place.³⁶⁷ With greater numbers of choreographers ultimately attaining copyright protection, more material would be taken out of the public domain, leaving future

363. See *infra* notes 369–82 and accompanying text (explaining the potential for awarding copyright protection to athletic moves).

364. See discussion *supra* Parts V.A.1–2 (discussing the merits of the arguments against the current definition of “choreographic works” and fixation methods for choreography, with respect to the constitutional purposes of copyright law).

365. BUREAU OF LABOR STATISTICS, *supra* note 260, at 2. The process of obtaining employment in the dance world can be intensely competitive. This is especially true for those hoping to dance on Broadway, where “almost no one makes it as just a dancer these days. Nearly everyone has to sing, act and dance, be what’s dutifully called a triple threat.” Peter Applebome, *As Dancing Booms on Broadway; In a Changed World, More Jobs, More Competition, Same Old Drive*, N.Y. TIMES, May 5, 1999, at E8. Moreover, the life of a dancer—either on Broadway or in a ballet company—can be exhausting, as one Broadway dancer describes:

“In ballet you have to keep a higher level technically, so in one way it’s physically more demanding” “But dancing on Broadway demands more on a performance level. You can’t get away with just being technically amazing the way you can in ballet. You really have to perform. The individual performance can be more difficult in ballet, but you don’t do it eight times a week, week after week, the way we do. And the way you get your job is so different. In Broadway your role is assigned before you start the work process. In ballet you’re a member of a company, so you’re always competing for roles. There’s a lot more angst in ballet.”

Id. In such a high-intensity environment, “[b]ackbone is everything” Laura Leivick, *Their Future in the Balance, They Dance for High Stakes*, N.Y. TIMES, May 27, 2001, at AR24.

366. BUREAU OF LABOR STATISTICS, *supra* note 260, at 2.

367. See discussion *supra* Part V.A.1–2 (discussing the ramifications of making it easier for choreographers to obtain copyright protection).

generations of choreographers fewer tools with which to work and create.³⁶⁸ Creation stifled, fewer new dances would be created, resulting in a decreasing number of jobs for dancers and choreographers who already experience tremendous difficulties maintaining continuous employment.

Moreover, simplifying the statutory requirements for obtaining copyright protection may also have the effect of needlessly granting copyright protection to subject matters beyond the realm of dance, ultimately extracting even more material from the public domain. In recent years, there has been a push for the copyrighting of sports and athletic moves under the guise of “choreographic works.”³⁶⁹ “Choreographic works” as a copyrightable subject matter is a natural springboard for many of these arguments, as some sports and athletic routines can be construed, albeit broadly, as choreography.³⁷⁰ For instance, *Open Source Yoga Unity v. Choudhury*, decided in 2005, specifically addressed the question of the copyrightability of yoga moves.³⁷¹ While the court did not settle this question, it held that it is at least possible for individual yoga positions to be “arranged in a sufficiently creative manner” to merit copyright protection.³⁷² The law has generally rejected similar arguments for the protection of sports and athletics moves as “choreographic works,”³⁷³ but if the statutory

368. A counterargument can be made that a choreographer’s creativity can never truly be taken away, as each choreographer has her own vision and inspiration that she brings to every step. See *supra* notes 65–72 (describing the distinctive ways in which choreographers approach the process of creating new dances and the unique inspirations that may fuel their work). While this is likely true, making it too simple to obtain copyright protection to the point that copyrights are everywhere will make the already difficult choreographic process even more challenging. See *supra* note 327 (noting the difficulties of creating in the face of copyrights and injunctions).

369. See generally William J. Fishkin, *Next on Floor Exercise*, Dominique Dawes©: *The Difficulties in Copyrighting Athletic Routines*, 11 SETON HALL J. SPORT L. 331, 334–35 (2001).

370. See, e.g., Karolina Jesien, *Don’t Sweat It: Copyright Protection for Yoga . . . Are Exercise Routines Next?*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 623, 638 (2007) (arguing that routine-oriented sports are comparable in many ways to traditional choreography because they “involve a particular routine, which the athlete may rehearse in the same precise way every time, where there is no need for alterations or for reactive movements during the performance itself”).

371. See *Open Source Yoga Unity v. Choudhury*, No. C 03-3182 PJH, 2005 WL 756558, at *1 (N.D. Cal. Apr. 1, 2005). Bikram Choudhury developed a yoga program, consisting of twenty-six yoga positions (called “asanas”), to be executed in a 100 degree Fahrenheit room. *Id.* Choudhury specifically claimed to have a valid copyright in the sequence of these yoga moves, and repeatedly warned “yoga instructors that they must obtain a license from him in order to teach Bikram yoga, which he asserts includes . . . all derivative forms of the sequence as well . . .” *Id.* In denying summary judgment to the plaintiffs, the court held that there was at least “a dispute of fact on the issue of whether sufficient creativity exists in the Bikram yoga routine so that copyright protection attaches.” *Id.* at *4. In so holding, the court reasoned that the plaintiffs did not present any “persuasive authority that a compilation of yoga asanas cannot be protected under the copyright laws in the same manner as other compilations.” *Id.*

372. *Id.* at *4.

373. One notable exception to this manifested itself in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*. See *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986); MELVILLE B. NIMMER & DAVID NIMMER, 1-2 NIMMER ON COPYRIGHT §

requirements for copyright protection were weakened, it may be possible that copyright protection would spin out of control, extending protection to sports moves in a way that would be detrimental to the public as a whole.

There are a few arguments as to why copyright protection of athletic moves and sports routines would generally be unfavorable. One widespread argument is that awarding copyright protection to sports moves would hinder the underlying competition associated with the execution of these moves and jeopardize the genuine public interest in athletic competition.³⁷⁴ If certain moves were granted copyright protection, then those moves would be extracted from the public domain and from use by other athletic competitors, consequently hindering athletes' ability to remain competitive.³⁷⁵ Another popular argument is that extending copyright protection to athletic moves does not conform with the rationale of copyright law in general.³⁷⁶ Following this line of reasoning, it seems that since athletes generate a great deal of money and notoriety for their talents, "America already provide[s] athletes in at least some sports with enormous incentives for experimentation and creativity."³⁷⁷ As a result, awarding copyrights to athletic moves would not serve the underlying social and constitutional purposes for which copyright protection was created.³⁷⁸

Weakening the statutory requirements for obtaining copyright protection for "choreographic works" could thus have the effect of making it easier to obtain copyrights for dances, as well as non-traditional choreographic works, such as yoga moves.³⁷⁹ Some of these non-traditional choreographic works

2.09 [F] (2007). Although this case held that it was possible for a baseball game to be copyrighted, this ruling has been criticized for failing to support this holding with legal precedent, and on account of the court's contradiction in requiring originality for copyright protection while "twice express[ing] doubt as to the creativity of the performance of baseball players on the field." NIMMER & NIMMER, *supra* note 373, at § 2.09 [F].

374. Jesien, *supra* note 370, at 648; Fishkin, *supra* note 369, at 337 ("[I]t is precisely this public interest in competition that must be balanced against the statutory protection of copyrighted works.").

375. Jesien, *supra* note 370, at 648 ("Given that athletes are already driven to win games, the incentive for creating new moves is already in place; therefore, providing a monopoly right for such creation would be unnecessary and perhaps harmful." (footnote omitted)).

376. Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L. & ARTS 317, 334 (2000) (noting that it might not be consistent with the rationale of copyright law to award protection to sports moves, since "athletes already have extraordinarily powerful incentives for the creation of new moves").

377. *Id.* at 334.

378. See *supra* notes 42–46 (explaining the constitutional and philosophical purposes of copyright law in American society).

379. Yet, there is a balance to be achieved in this realm of athletics and copyright law, just as there remains a delicate balance between the encouragement of choreography and copyright law.

are already gaining minor favor under the law, so if copyright standards were relaxed, protection would likely flourish to the point that copyrights would block every creative tendency encountered.³⁸⁰ While some may fault the arguably general definition of “choreographic works” for the support for copyright protection in these new realms, it would continue to be detrimental to limit that particular definition.³⁸¹ Further restricting the definition would not only exclude some choreographic works and dances that are deserving of protection, but it would also exclude those sports routines that have valid choreographic elements, such as figure skating programs.³⁸²

B. Moral Rights Is Not the Pointe of Copyright Law

Several writers contend that the notion of moral rights should be incorporated into American copyright law, thereby protecting the choreographer’s artistic and economic rights.³⁸³ Following this line of reasoning, however, would be exceptionally contradictory to the Constitution. As has been reiterated throughout this article, the rationale of copyright protection is to encourage artists and authors to create works for the benefit of the American public by granting exclusive rights to their creations as a reward.³⁸⁴ From the Copyright Clause, Congress has received

See supra note 44 and accompanying text. Some athletic routines remain close enough to *Compendium II*’s definition of “choreographic works” that they should enjoy copyright protection, the common examples being figure skating, gymnastics, and synchronized swimming routines. *See* Fishkin, *supra* note 369, at 335. As one legal writer comments:

[I]t can hardly be contested that the typical figure skating routine qualifies as ‘a series of rhythmic and patterned bodily movements usually performed to music,’ as do most gymnastics floor exercises and synchronized swimming routines. As these athletic routines seem to be well within the confines of the generally accepted definition of dance, Congress would be hard-pressed to deny their inclusion under the generally accepted definition of choreography.

Id. The copyrighting of such choreographed routines would typically not risk inconsistency with the underlying purpose of copyright law, as these routines are performed not only at competitive events, but also at exhibition shows, which serve the function of entertainment, rather than competitive sport. Weber, *supra* note 376, at 334–35. Of course, the basic, foundational moves that are inherent in these sports, such as the double axel in figure skating, would remain an uncopyrightable element, akin to the inability to copyright the most basic elements of classical ballet, such as the second position. *See id.* at 337; *see supra* notes 159–61 and accompanying text (providing an overview of *Compendium II*’s definition of “choreographic works”). Consequently, extending copyright protection to such routines would not likely impede creativity in this arena.

380. *See supra* note 327 and accompanying text.

381. *See* discussion Part V.A.1 (arguing that the definition of “choreographic works” is not overly broad and should not be altered).

382. *See supra* note 379 (discussing the validity of figure skating as a potentially copyrightable “choreographic work,” despite its categorization as an athletic activity).

383. *See supra* notes 308–10 and accompanying text (discussing the general arguments in favor of adopting a moral rights tradition and including dance community protections in formal copyright law).

384. *See supra* notes 42–46 and accompanying text (discussing the constitutional purpose of

“two separate and distinct powers[:] the one directed to promoting the progress of science and the other to promoting the progress of useful arts.”³⁸⁵ Protecting the rights of the artist and his creations is an admirable notion and it can be argued that providing for moral rights would encourage more choreographers to obtain copyright protection.³⁸⁶ However, to suddenly depart from the legal justifications for copyright law would be to cast off over two hundred years of constitutional history.

A more compelling argument would be to integrate the traditional dance community protections for choreography into the current copyright statutes, as some legal scholars have suggested.³⁸⁷ This would seem to provide choreographers with the best of both worlds by protecting both their economic and artistic interests.³⁸⁸ However, the law in general should not bend entirely in order to accommodate those customs. Simply codifying these customs seems to be a back-door means of cheating the legal system and integrating moral rights philosophies when this is not the intent of copyright law.³⁸⁹ In the meantime, choreographers remain free to resort to these customary protections and refrain from undertaking the process of

copyright law, as opposed to the moral rights tradition of European copyright law).

385. WALTERSCHEID, *supra* note 43, at 119.

386. See Forcucci, *supra* note 156, at 967–68 (“While choreographers value the artistic integrity of their work, current copyright legislation protects only their financial interests. . . . [C]horeographers will continue to lack any incentive to pursue statutory protection until copyright legislation offers the type of protection they desire; that is, the type of protection offered within the dance community.” (footnotes omitted)).

387. See *supra* notes 308–10 and accompanying text (noting several authors who support the integration of copyright law and the customs of the dance community); see *supra* Part II.B (explaining the customary protections afforded to choreographers in the absence of legal protections). In her law review article, Professor Singer argues:

[I]nstead of pursuing statutory protection, . . . American choreographers have continued to rely upon their own customary rules. These artists have eschewed statutory protection because they believe that the delicate balance that they have struck for themselves is at present superior to any mechanism offered to them by statute. . . . The fact that choreographers have made a conscious choice in favor of their system reinforces the authority of this custom. For custom always draws its strength from the consent of those agreeing to be bound by it. Thus, for as long as American choreographers believe in and abide by their self-imposed customary rules, the custom of the dance community will indeed continue to offer the best means of recognizing and protecting the artistic rights of American choreographers.

Singer, *supra* note 68, at 319.

388. *Id.* at 318–19; see also Forcucci, *supra* note 156, at 967–68 (arguing that “a law that codifies the customary practices of the dance community would better serve choreographers and thereby entice them to seek statutory protection for their work under the Copyright Act” (footnote omitted)).

389. See *supra* notes 42–46 (discussing the constitutional rationales of copyright law).

obtaining copyrights, should they deem such defenses to be superior to legal safeguards.³⁹⁰

C. *Steadying the Fouetté: Possible Solutions*

Rather than completely altering the face of American copyright law for the sake of choreographers, there are potentially successful alternatives available to encourage more choreographers to take advantage of the legal protections available to them. Since one of the primary complaints among most commentators is that the costs of obtaining copyrights for choreography are too high for the average choreographer,³⁹¹ the best mechanism by which more choreographers can better rely on copyright protection is to draw greater economic resources to dance companies.

1. Increased State and Federal Funding

The reality is that the success of dance companies often hinges on funding and the amount of money that these groups have at their disposal.³⁹² It takes a huge sum to run a dance company, as each must pay endless expenses for rehearsal spaces, performance fees, costumes and sets, accompanists, touring expenses, supplies for dancers (including pointe shoes³⁹³ for ballet companies), and countless other operating costs.³⁹⁴ Quite

390. See Singer, *supra* note 68, at 319 (maintaining that the traditional protections of the choreographic community provide better protection of choreographers' interests than American copyright law).

391. See *supra* notes 185–92, 302–07 and accompanying text (discussing the often expansive financial and artistic costs of memorializing choreography in a fixation method adequate for copyright protection).

392. As the NEA reports, “[h]ealthy finances enable dance companies to perform quality work, expand dance audiences, and achieve other goals set by nonprofit performing arts organizations.” NAT’L ENDOWMENT FOR THE ARTS, *supra* note 109, at 27. As one dance company director has explained, “[i]n dance, you see companies that are always on the brink of going out of business, like Dance Theatre of Harlem. Across the country, you see companies start, then go out of business because it’s just too hard. There is not enough support, financial support.” TILGHMAN, *supra* note 321, at 7.

393. Pointe shoes can be extremely expensive because of the intense labor required to craft a pair of pointe shoes and the materials that must be used. BARRINGER & SCHLESINGER, *supra* note 97, at 41. To be effective,

dancers need handcrafted shoes made of natural, flexible materials. In the process of doing their work, they destroy their shoes rapidly. Due to the poorly subsidized state of the arts in this country, neither dancers nor the companies they work for can afford the cost of shoes. On the other hand, manufacturers cannot turn to automation or plastics as a means of controlling prices.

Id. Ballerinas almost always spend time “breaking in” brand new pointe shoes in order to find “a workable compromise between the original rigidity of the shoe, needed for support, and the right amount of ‘give’ needed for fluid motion.” *Id.* at 39. In the process, dancers decrease the life of their pointe shoes to an even greater extent by “banging them in doors, whamming them with hammers, and having large men jump up and down on them,” which can have the result of making

often, the choreographer can be caught in the middle, especially those choreographers who maintain permanent positions with ballet companies.³⁹⁵ With expenses constantly rising, there is little incentive for dance companies to funnel their limited funds toward obtaining copyright protection for their choreographic works.³⁹⁶ To the average artist or author, the costs of attaining legal protections for creations is reasonable, but to the choreographer, the price of copyright—and specifically fixation—can be much too high.³⁹⁷

Several legal writers have suggested various economic solutions to this problem, proposing that the government simply decrease the general costs of seeking copyright protection³⁹⁸ or that the government provide financial assistance to dance companies and choreographers to pay for the more pricey, but accurate fixation methods.³⁹⁹ Both are admirable propositions, particularly following Abitabile's and Picerno's logic that resolving these financial burdens on choreographers is essential to maintaining the motivation to seek copyright protection in the first place.⁴⁰⁰ However, these

the pointe shoes last about half as long as they otherwise would. *Id.* While there are several methods of re-hardening pointe shoes and making them last longer, new pointe shoes are always preferred. *See id.* at 41–45 (discussing various techniques to make pointe shoes last longer, such as using shellac to re-harden the toes of the shoes).

394. *See* Forcucci, *supra* note 156, at 968. A huge amount of a dance company's budget also goes toward paying the dancers and staff who make up the company. MUNGER, *supra* note 277, at 8. Generally, it is typical for the wages paid to dancers and staff to total at least 50% of the company's operating budget. *Id.* Despite the amount of wages paid, the fact remains that dancers and company staff are "underpaid and overworked." *Id.*

395. The following analysis is just as relevant for independent choreographers who are contracted by dance companies as it is for those choreographers who are retained more permanently by dance companies. The independent choreographer is quite often at the mercy of dance company funding, just as if he was on staff at a dance company, and a company that is better-funded can afford to pay an independent choreographer at greater rates, thereby enhancing his capacity to focus on the costs of copyrighting his works. *See supra* notes 392–97 and accompanying text (discussing the costs of running a dance company). Additionally, the fact that a particular choreographer may act independently or be employed by a dance company may implicate issues under the works made for hire doctrine and ownership of works, but these issues are beyond the scope of this Comment and are irrelevant to this analysis. *See supra* notes 150–51 and accompanying text (discussing briefly the works made for hire doctrine).

396. *See supra* notes 185–92, 302–07 and accompanying text (explaining the high costs of "fixing" choreography and the ramifications of those costs).

397. *See* Abitabile & Picerno, *supra* note 55, at 59–60 (noting that while the costs of obtaining copyright protection are generally low, the expense of defending copyright infringement battles can be prohibitive for choreographers); *see supra* Part III.B.3 (discussing the average costs of the fixation methods available to choreographers).

398. Abitabile & Picerno, *supra* note 55, at 59–60.

399. Lula, *supra* note 72, at 194.

400. Abitabile & Picerno, *supra* note 55, at 60 ("Choreographers will never have incentive to

proposals do not seem to target the heart of the matter and offer merely a quick-fix approach. Moreover, it seems that a decrease in the costs of copyright protection and associated expenses would not necessarily encourage more choreographers to seek legal protection, due to ever-persistent concerns of paying salaries to dancers and staff and production costs.⁴⁰¹ A more effective, long-term solution would be an increase in overall federal funding to dance companies and independent choreographers.

Currently, most dance companies are run as nonprofit organizations,⁴⁰² and they rely heavily on private support from their communities and donors,⁴⁰³ especially in light of the decline in government funding and federal grants over the past few decades.⁴⁰⁴ Additionally, much of a dance company's private support can depend on ticket sales, as it has been "found that every \$1 in ticket sales generate[s] about 14 cents in contributions."⁴⁰⁵ However, state and federal funding also play a pivotal role in this equation. The NEA is quite influential in terms of garnering private economic support, with the assistance of "required matching grants and other factors such as the prestige conferred to grantees."⁴⁰⁶ In fact, the NEA has found "that

protect their works if they know that they will never be able to afford to actually enforce the law if infringement does occur.").

401. See *supra* notes 392–97 and accompanying text (discussing the high expenses associated with operating a dance company).

402. See *supra* note 278 (explaining the nature of nonprofit dance companies).

403. A long-standing trend among ballet companies is the notion of sponsorship of individual dancers by private patrons. Erika Kinetz, *How Much is that Dancer in the Program?*, N.Y. TIMES, Aug. 15, 2004, at AR1. The amounts that patrons pay varies, usually depending on the individual dancer and his or her rank in the company, but typically, patrons pay between \$2,500 and \$100,000 per year. *Id.* While this system has often been criticized for demoralizing the art and its hierarchical structure, many companies and dancers view this as a necessary means of economic support, particularly in a time when government funding is waning. *Id.* at 8. John Welker, a dancer with the Atlanta Ballet, has called his patron "a cornerstone of this community," and commented on the importance of sponsors, saying, "To be quite frank, they are paying your salary." *Id.* Similarly, Ethan Stiefel, principal dancer with American Ballet Theatre, has defended the notion of sponsorship, noting, "You have to have a practical sense of what the business of ballet is. It's kind of a fact of life of arts in America." *Id.* Moreover, Stiefel distinguishes the support of his sponsor, Anka Palitz, from endorsements and sponsorships in athletics, stating, "It's not like a Nascar thing, that I'm going to wear 'Anka Palitz' on my sleeve or costumes." *Id.* The importance of sponsorship was also captured in the 2000 feature film *Center Stage*, in a scene at a ballet company gala, in which the director of the ballet company tells one of his principal dancers, "There's a woman here whose husband just died leaving her 200 million dollars and she adores you. Let me introduce you." *CENTER STAGE* (Columbia Pictures 2000). The dancer responds, "Now why does that feel wrong?" to which the company director replies, "Oh it's just a hello . . . it would be great for the company." *Id.*

404. MUNGER, *supra* note 277, at 13–14; see *supra* note 277 (discussing the gradual decline in federal funding to dance companies). Not only has federal funding for dance companies and choreographers decreased, but the number of dance companies is concurrently on the rise, thus putting companies and choreographers in direct competition with each other for what little government funding there is available. TILGHMAN, *supra* note 321, at 6.

405. NAT'L ENDOWMENT FOR THE ARTS, *supra* note 109, at 30.

406. *Id.* at 8.

every \$1 in NEA grant funding leveraged about \$3.50 for dance companies from other sources.”⁴⁰⁷ This means that a \$15,000 grant to a dance company can stimulate up to \$52,500 in donations and contributions.⁴⁰⁸ Although an increase in government funding may be a more difficult solution to employ due to budget cuts in the NEA and the gradual decline in arts funding,⁴⁰⁹ increased state and federal funding would have significant consequences on the economic health and vitality of dance companies and choreographers.

Consequently, a focus on increasing government funding and support of dance companies and choreographers would lessen the economic woes of companies and choreographers,⁴¹⁰ thereby allowing these groups to shift their focus toward adequately protecting their creations. The availability of funding also has a direct impact on the creative spirit of the choreographer, as those who are financially better-off are more free to experiment with creation than other choreographers, who are compelled to restage old classics for the sake of drawing larger audiences and more money.⁴¹¹ Thus, to target the purposes of copyright law and sustain incentives for creativity and new works for the public good, the answer cannot merely be decreasing the costs associated with copyright protection, but it must be centralized on the choreographer, for without encouraging the choreographer, there is no hope of copyright law encouraging creation.⁴¹²

2. Arts Education and Community Outreach

A closely related solution, and another means of making it more economically feasible for choreographers to seek copyright protection, is the development and promotion of arts education and community outreach programs.⁴¹³ For decades, there has been overwhelming evidence of the

407. *Id.*

408. *Id.*

409. See MUNGER, *supra* note 277, at 11–13 (describing the general decrease in government support for dance and the arts over the past twenty years).

410. In a survey of approximately sixty persons associated with dance, including choreographers and artistic directors of dance companies, the top concern among these representatives was funding. TILGHMAN, *supra* note 321, at 7, 11–12.

411. *Id.* at 6; see, e.g., NAT’L ENDOWMENT FOR THE ARTS, *supra* note 109, at 30 (“The staging of popular ballets such as *The Nutcracker* and *Swan Lake* help ballet companies sell more tickets and garner donations.”).

412. See Abitabile & Picerno, *supra* note 55, at 60 (arguing that Congress should lower the monetary fees necessary for gaining and litigating copyright protection, concluding that “[c]horeographers will never have incentive to protect their works if they know that they will never be able to afford to actually enforce the law if infringement does occur”).

413. See, e.g., *infra* note 419 and accompanying text (providing examples of arts education and

importance of the arts in education⁴¹⁴ as America's schools fully integrated the teaching of music alongside more substantive, academic subjects.⁴¹⁵ Recently, however, arts education programs in schools and communities have been declining, which many dance companies and choreographers believe has an impact on their own audiences and support.⁴¹⁶ This decreased support for dance is likely not due to a lack of interest, but perhaps since dance is so readily available through television thanks to shows such as *Dancing With the Stars*,⁴¹⁷ consumers feel less compelled to leave their

outreach programs developed by various dance companies).

414. For instance, in a recent study of students participating in arts education programs, students exposed to the arts "performed better in six categories of literacy and critical thinking skills—including thorough description, hypothesizing and reasoning—than did students who were not in the program[s]." Randy Kennedy, *Guggenheim Study Suggests Arts Education Benefits Literacy Skills*, N.Y. TIMES, July 27, 2006, at E1.

415. As one commentator explains, in decades gone by, the exposure of the arts in public schools was simple:

Music was part of the curriculum, like math, science and social studies. Kindergartners and first graders began with singing, note-reading and rhythm-beating, and as the course continued through high school, it touched on the history of music and how it works Even more crucial, if you wanted to play an instrument, lessons were free, and the school would lend you an instrument until you felt sufficiently committed to buy your own.

Allan Kozinn, *To Provide Quality Music Education Now, Schools Could Learn From the Past*, N.Y. TIMES, Dec. 25, 2007, at 8.

416. TILGHMAN, *supra* note 321, at 2–3 (Dancers and choreographers "perceive a lack of education among audience members, which they attribute to a dearth of arts education in the schools. There is an increased desire of core audience members to know more, and companies are using web communications and 'talk-backs' to deepen their relationships. Some presenters and dance artists have been successful at expanding their base of committed audiences by deepening their knowledge and appreciation of the work through multiple encounters, pre- and post-performance opportunities for conversations, and/or email exchanges. However, people noted these efforts require increased time, attention, staff, and other administrative resources that can overburden companies and presenters."). Beyond merely an arts education, education in general is linked to support and participation of the arts, as the NEA has noted that "[m]ore than any other demographic factor, going to arts events and art museums is highly correlated with an individual's educational attainment. Education is much more predictive of arts attendance than household income, for example." NAT'L ENDOWMENT FOR THE ARTS, RESEARCH DIV. REPORT NO. 45, 2002 SURVEY OF PUBLIC PARTICIPATION IN THE ARTS 19 (2004), available at <http://www.nea.gov/research/NEASurvey2004.pdf>.

417. *Dancing With the Stars* is a reality television show that pairs celebrities with professional ballroom dancers, as the pairs compete before a panel of judges, hoping ultimately to be pronounced the winners. Part of the appeal of this particular program is the chance to see celebrities in a different element, as one writer describes, dance

serves as a magnifying glass, and no amount of slick talk or charm can hide the truth about your personality. The awkward sight of Evander Holyfield, a contestant on "[Dancing With the] Stars," performing with his eyes partly shut and his arms snaking forward in a half-hearted attempt at a swim stroke, was real life: most of us have a grim memory of watching a bridegroom battle his way through the first dance at a wedding reception.

Gia Kourlas, *Dance, A Last Resort, Rises on Reality TV*, N.Y. TIMES, Sept. 9, 2005, at E1. However, shows like *Dancing With the Stars* and dance competitions in general have drawn criticism for their competitive nature. See Erika Kinetz, *Budding Dancers Compete, Seriously*, N.Y. TIMES, July 7,

homes and pay more money to support live dance performances.⁴¹⁸ This has left many dance companies scrambling to develop their own outreach and education programs, such as American Ballet Theatre, which offers a program that immerses local students in the production of a ballet.⁴¹⁹ While companies have excelled at reaching out to schools and communities to drum up support for dance, greater efforts are required.⁴²⁰

Beyond ultimately encouraging more choreographers to create new works and to seek copyright protection, greater support for dance in America's schools and communities will also likely increase contributions to dance companies and choreographers. Since choreographers and companies greatly rely on private support from donors,⁴²¹ increasing education and awareness of dance among communities and schools will likely foster new generations of dance enthusiasts, eager to fill in the financial gaps of government assistance.⁴²² This in turn will have a direct effect on the creation of new ballets and the steering of funds toward the protection of these new works through copyright law.⁴²³ The biggest challenge seems to be getting audiences to the theatres to see live dance performances in the first place.⁴²⁴ While choreographers and dance companies are doing their

2005, at E8. Former head of the National Dance Education Organization, Elsa Posey, has said, "Dance is not a sport, it's an art. . . . In art, the competition is within oneself." *Id.* at E8. Yet, while infusing dance with competition may detract somewhat from the purposes of the art, these competitions can bear extremely rewarding results for young dancers, including important job opportunities. *Id.*

418. TILGHMAN, *supra* note 321, at 3; *see also supra* note 357 and accompanying text (noting Merce Cunningham's recent use of the Internet to expose consumers to his dance company's classes and rehearsals).

419. ABT: Education and Training, <http://www.abt.org/education/makeaballet.asp> (last visited Oct. 14, 2008). This program, known as *JPMorgan Make a Ballet*, "offers students the opportunity to design, choreograph, construct, produce, and perform their own original performance piece. . . . under the tutelage of ABT teaching artists." *Id.* Similar efforts are made by companies across the nation, including several dance groups in San Francisco and San Diego, which run "Trolley Dances," in which dancers are positioned "at trolley stops to encourage hundreds of people to see new work." TILGHMAN, *supra* note 321, at 3.

420. *See id.* at 9.

421. *See supra* notes 402–08 and accompanying text (discussing the reliance of dance companies on the contributions of private donors, especially in light of the dramatic decrease in government funding of the arts).

422. *See supra* notes 413–20 and accompanying text (discussing the link between education and support for the arts).

423. *See supra* notes 411–12 and accompanying text (explaining that dance companies must often perform ballet classics rather than new pieces for the sake of drawing in more revenue).

424. Over the past sixteen years, attendance at both live ballet and other dance performances has gradually declined. *See NAT'L ENDOWMENT FOR THE ARTS, supra* note 416, at 13. While 8.7 million people attended a ballet performance at least once in 1992, this number fell to 8 million in

part to encourage Americans to support the arts, this has not proven to be enough and the responsibility is now shifting to the government and private organizations to help encourage such participation. While government support of the arts is waning, the encouragement of artistic endeavors and education by private organizations has the ability to dramatically alter the financial and creative landscape for countless dancers and choreographers.⁴²⁵

VI. CONCLUSION

Dance writer Jack Anderson once asked, “[i]f in the Black Swan pas de deux the ballerina cannot adequately perform all thirty-two fouettés, may she replace them with other brilliant steps?”⁴²⁶ Ballerinas who are daunted by the task of performing these difficult and challenging turns are often tempted to excise the fouettés altogether because they feel that performing them poorly would be far worse than not executing the turns at all.⁴²⁷ To those who are more interested in the athleticism of ballet and perfect technique, this may be true. But as Wanda Farah said of these thirty-two fouettés, “[i]t is absurd to decide [whether to perform the turns] on the basis of liking them as they appear in some altogether different context, and too facile to leave them out altogether because [the ballerina] can’t do them.”⁴²⁸

Much the same can be said of copyright law as it pertains to the protection of choreographic works. Although the law is not without its flaws, completely altering the face of copyright legislation merely to simplify obtaining copyrights for choreographic works would be far worse than dealing with and working through its relatively minor imperfections. To the ballerina who is having difficulty mastering the fouettés, the answer is to return to the dance studio to practice until they are executed properly and consistently, rotating in the exact same spot every time. All that will result from removing the thirty-two fouettés from *Swan Lake*'s

2002. *Id.* Similarly, 13.2 million people saw at least one performance of other types of dance, such as modern or tap, in 1992, but this number also dropped, as 12.1 million saw at least one such performance in 2002. *Id.* This compares to the 32.3 million people who saw at least one musical play in 1992, which increased to 35.1 million people attending at least one musical play in 2002. *Id.*

425. For instance, to name just one dance support organization, the National Dance Education Organization (NDEO) “works with artists, educators, and administrators in all environments where dance is taught. This includes private and public schools of dance, professional preparation programs, outreach programs of performing arts and community/cultural centers, PreK-12 institutions, and colleges and universities.” National Dance Education Organization—Who We Are, <http://www.ndeo.org/whoweare.asp> (last visited Oct. 14, 2008). Since its founding, NDEO has “initiated an important, on-going dialogue with other professional organizations and legislative bodies to address the issues and policy decisions that impact quality dance education in America’s schools, studios and universities.” *Id.*

426. ANDERSON, *supra* note 82, at 16.

427. *See id.* at 27.

428. Farah, *supra* note 4, at 306.

choreography is an imperfect story,⁴²⁹ often a disappointed audience,⁴³⁰ and almost always, a dissatisfied ballerina.⁴³¹

Indeed, Anderson observes that “the ballerina, reluctant to look less than dazzling, might go ahead and change the steps anyway. Even so, her artistic conscience ought to be reminding her that she still remains at least thirty-two fouettés short of perfection.”⁴³² Similarly, the challenges of current copyright legislation cannot be overcome by abandoning or changing the law to make it easier for choreographers to obtain copyrights. Changing the law will only undermine the reasons for which copyrights were granted in the first place and leave choreographers scrambling to work within a shrinking public domain.⁴³³ As the critics try to disturb copyright law’s fouettés, it is now the task of the legislature to steady its balance and continue turning in the precise point at which the fouettés started.

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429. Commenting on a panel presentation with five ballerinas from Pacific Northwest Ballet who would be dancing the roles of Odette and Odile in *Swan Lake*, a reporter noted that the dancers were asked how they felt about the 32 fouettés and whether they were really essential to the role, or whether other combinations of steps might be just as effective. Happily, everyone responded that they felt it was essential to rise to the occasion and the challenge of the 32 *fouettés* and some expressed agreement with . . . [the] choice to add them in the 1895 version as an expression of Odile’s steely resolve.

Francis Timlin, Pacific Northwest Ballet—“Dancing Odette/Odile: Ballet’s Great Dual Role”: Panel Discussion, http://www.criticaldance.com/features/2003/PNB_Panel_20030916.html (last visited Oct. 14, 2008).

430. A panel of five ballerinas dancing the role of Odette/Odile in *Swan Lake* discussed the famous thirty-two fouettés and “[t]here was . . . general acknowledgment that not to do them would prove a great disappointment to the expectations of many in the audience—including those . . . who . . . [consistently] count each fouetté.” *Id.*

431. Commenting on performing the thirty-two fouettés in *Swan Lake*, Leanne Benjamin, a principal dancer with The Royal Ballet, has said: “There is a step there in *Swan Lake* that everybody knows about which is the thirty-two fouettés. . . . And, you know, if you do thirty you’re upset . . . you’ve gotta get to thirty-two and that just takes a lot of strength, stamina, and determination.” Video with Leanne Benjamin, Principal Dancer, The Royal Ballet, available at http://www.rohedswanlake.org.uk/pgs/main/video_play.asp?id=4&Qid=209.

432. ANDERSON, *supra* note 82, at 27.

433. See *supra* notes 42–46, 128–35 and accompanying text (discussing the constitutional theories of copyright law and the public domain).

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