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Choreography and Copyright: Why the Law Must Twist and Turn to Serve the Dancing Industry

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CHOREOGRAPHY AND COPYRIGHT:
WHY THE LAW MUST TWIST AND TURN TO
SERVE THE DANCE INDUSTRY

Gabrielle Mix

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I. INTRODUCTION

Making a living on creativity is no easy feat. The time spent cultivating a piece of art is significant, and the work may be a success, or it may not be.¹ In the dance industry, choreographers may work on a piece

¹

Choreographer, DANCE CONSORTIUM,
<https://danceconsortium.com/features/in-and-around-a-dance-company/choreographer/> (last visited Mar. 9, 2022). There is a significant amount of time, effort, and knowledge needed to create a dance. *Id.* (“In a professional dance company a choreography may have anything from 3 months to 3 years to create a work.”).

for months or even years. Yet only patrons of the arts, few and far between, financially reward choreographers.² The industry, which is comprised largely of nonprofit organizations and small private companies,³ must rely heavily on government spending and donors.⁴ Because choreographers rely on performances as a main source of income, the dance industry was hit especially hard when COVID-19 made performing impractical—in 2020, the average mean salary for Americans was \$71,456 compared to dancers whose mean salary was \$32,147.⁵ It is now more important than ever for choreographers to capitalize on their creations.⁶ They may seek to do so through intellectual property law.⁷ With copyright protection, choreographers gain the exclusive rights to control the use and distribution of their work and benefit monetarily when their pieces are recreated by others.⁸ However, receiving copyright protection is also no easy feat.⁹ Although copyright protects choreography the moment it is created, the choreographer cannot enforce their rights unless the work is registered,¹⁰

² Alexander Kunst, *Share of Americans Who Booked Tickets for Theater / Ballet / Opera in the Past 12 Months in 2022, by Age*, STATISTA, (April 2022), <https://www.statista.com/statistics/227489/dance-or-ballet-performance-visitors-usa/>. In 2022, only 5% of Americans aged 18–29 attended dance or ballet performances in the past year, 5% of Americans aged 30–49 attended dance or ballet performances in the past year, and 2% of Americans aged 50–64 attended dance or ballet performances in the past year. *Id.*

³ Shakira Segundo, *Dance Comeback: The Impact of COVID-19 on the Dance Field and the Future of Dance*, DANCE/USA, (Aug. 13, 2021), <https://www.danceusa.org/ejournal/2021/08/13/dance-comeback-the-impact-of-covid-19-on-the-dance-field-and-the-future-of-dance> (“The dance field is primarily comprised of non-profit organizations and small businesses.”).

⁴ *Annual Wage and Salary per Full Time Equivalent Employee in the United States from 2000 to 2020*, STATISTA (Nov. 11, 2021), <https://www.statista.com/statistics/243842/annual-mean-wages-and-salary-per-employee-in-the-us/>; *Dancers and Choreographers*, DATAUSA, <https://datausa.io/profile/soc/dancers-choreographers?compare=business-financial-operations-occupations> (last visited April 6, 2023).

⁵ Segundo, *supra* note 3 (“The performing arts industry saw a decline in consumer spending by more than \$30 billion. The dance field was crippled at the onset of the pandemic in March 2020.”).

⁶ Harmony Gbe, *Barristers Tips*, L.A. LAWYER, June 2020, at 9.

⁷ *Id.*

⁸ *Id.*

⁹ Kathleen Abitabile & Jeanette Picerno, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 CAMPBELL L. REV. 39, 40 (2004).

¹⁰ Gbe, *supra* note 6.

and proving a copyright claim is difficult for choreographers.¹¹ This is because copyright law has not molded to fit choreography.¹²

For over a century, the Copyright Office did not recognize choreography as copyrightable because it was not “useful to the public.”¹³ When the Copyright Office recognized choreography in 1947, it added a requirement that the work must be a dramatic or dramatico-musical composition.¹⁴ Essentially, the work had to tell a story in order to be eligible.¹⁵ Because choreography “is not inherently a drama-conveying medium,” this limitation excluded a large amount of choreography from protection.¹⁶ Finally, in the late twentieth century, the law allowed choreography to be copyrightable without the strict dramatic requirement.¹⁷ However, the law’s language is unclear and offers little guidance to courts and choreographers.¹⁸ Additionally, the requirements are not well-suited to the choreographic process.¹⁹ To gain protection under copyright law, a choreographic work, just like all other copyright works, must be (1) “an original [(2)] work of authorship” (3) “fixed in a tangible medium.”²⁰ Each of these elements has proved difficult for choreographers to meet and for courts to decipher.²¹

First, creating something original is inherently difficult for dance choreographers. Like all art, dance is largely mimetic.²² Dancers grow up

¹¹ Abitabile & Picerno, *supra* note 9, at 39, 40.

¹² *Id.*

¹³ *Id.* at 39, 41.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 42.

¹⁷ Abitabile & Picerno, *supra* note 9, at 42.

¹⁸ Julie Van Camp, *Copyright of Choreographic Works*, ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK (1994), at 59, 60.

¹⁹ See Joi Michelle Lakes, *A Pas de Deux for Choreography and Copyright*, 80 N.Y.U. L. REV., 1829, 1841 (2005) (“while it can be argued that Congress was correct to be as general as possible in drafting Copyright law so that courts would have the flexibility to apply the law to matters of first impression, giving courts no direction in how to apply the law [to choreography] may have led to an application contrary to congressional intent.”).

²⁰ Van Camp, *supra* note 18, at 80.

²¹ See Joi Michelle Lakes, *A Pas de Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1841 (2005).

²² Adelaide Saucier, *Dance and Copyright: Legal “Steps” for Performers*, CENTER FOR ART LAW (Oct. 30, 2018),

learning the art form by following in the steps of those before them.²³ They study the works of George Balanchine, Martha Graham, and Bob Fosse,²⁴ imitating every miniscule detail from the exact angle of the chin to the perfect roll of the wrist. Thus, when those dancers begin to create their own works, much of their choreographic style stems from those they have studied.²⁵ This would be of no negative consequence, but for the originality element of copyright law.²⁶ Choreographers must strive to create something new to benefit from copyright protection.²⁷ Even if they believe they created something unique from their own perspective, courts may not agree.²⁸ Most judges have no experience with choreographing a dance, thus their perspective on whether a creation is original may be skewed by irrelevant factors, such as lighting, costumes, sets, or a piece of music.²⁹ Many people in the dance industry wonder whether judges possess the expertise necessary to determine whether choreography is “original.”³⁰

<https://itsartlaw.org/2018/10/30/dance-and-copyright-legal-steps-for-performers/>.

²³ Kevin Laland, Clive Wilkins & Nicky Clayton, *The Evolution of Dance*, 26 CURRENT BIOLOGY, R5 (Jan. 11, 2016), <https://www.sciencedirect.com/science/article/pii/S0960982215014256> (discussing how dancers learn through imitation).

²⁴ See *id.*; see also Danceus Staff, *5 Iconic Modern Dance Performances & Examples*, DANCEUS.ORG, <https://www.danceus.org/modern-dance/5-iconic-modern-dance-performances/> (last visited Nov. 5, 2021); see also *15 Most Famous Jazz Dancers That Made it to the Zenith*, DANCEPOISE, <https://dancepoise.com/most-famous-jazz-dancers-ever> (last visited Nov. 5, 2021).

²⁵ See Laland et al., *supra* note 23.

²⁶ *Copyright Basics*, UNIV. OF MICH. (July 19, 2021, 8:27 AM), <https://guides.lib.umich.edu/copyrightbasics/copyrightability> (“In order to qualify for copyright protection in the United States, a work must satisfy the originality requirement.”).

²⁷ See Charlotte Waelde & Philip Schlesinger, *Music and Dance: Beyond Copyright Text?*, SCRIPTED, (2011) <http://script-ed.org/?p=83>.

²⁸ Abitabile & Picerno, *supra* note 9, at 40.

²⁹ See *id.*

³⁰ *Id.* (“Yet judges and courts cannot be entrusted to make decisions regarding dance because they cannot appreciate the subtlety of a movement, as can a trained eye.”).

Additionally, courts have struggled to interpret the meaning of “work of authorship” as it applies to choreography.³¹ In that context, the creation must be a “choreographic work” and not a “social dance step.”³² However, the line between the two is blurry, causing an incohesive implementation of the requirement across courts and confusion among choreographers.³³ Although it may seem clear that George Balanchine’s *The Nutcracker* is a choreographic work, while “the hustle” is a social dance step, many works fall somewhere in between.³⁴ Is it the length of time, the complexity, the availability of the choreography to the public, or some other deciding factor that matters in this analysis? Courts and choreographers alike do not possess a solid basis for deciphering whether a creation is a “work of authorship.”³⁵

The fixation requirement adds yet another layer of complexity to how choreography interacts with copyright law.³⁶ The natural process of the art form begins with a choreographer setting movements on dancers, then those dancers perform live to an audience.³⁷ Unlike other copyright subject matters like literary works or architectural works,³⁸ dance is not naturally memorialized with pen and paper.³⁹ Therefore, choreographers must go out of their way, taking time and funds away from their work, to implement this additional step into their process.⁴⁰

Furthermore, advancements in technology and the rising influence of social media have allowed for a new way dance choreography is

³¹ See *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 621 (D. Md. 2020).

³² *Van Camp*, *supra* note 18, at 60. “The Horgan court cites approvingly publications from the Copyright Office that ‘social dance steps, folk dance steps, and individual ballet steps’ are for choreographers as words are for writers, and, in an of themselves, cannot be copyrighted.” *Id.* at 63.

³³ *Van Camp*, *supra* note 18, at 60.

³⁴ *Id.* at 65.

³⁵ *Id.* at 74.

³⁶ See generally U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 805–806 (2021).

³⁷ See *Choreographer*, *supra* note 1.

³⁸ See 17 U.S.C. § 102.

³⁹ See *Van Camp*, *supra* note 18, at 70.

⁴⁰ See *id.*

presented and shared.⁴¹ With media platforms such as TikTok and YouTube, anyone can become a choreographer.⁴² Dance is now more accessible than ever to more people.⁴³ Anyone can showcase their creativity and share it with people from across the globe who can then recreate it themselves.⁴⁴ This has brought attention and a newfound excitement to the art form, but choreographers are starting to realize that their creations deserve protection.⁴⁵ When a dance goes “viral” and people around the world are trying out the moves, the choreographer is often left behind without credit or compensation.⁴⁶ This is because it is difficult to trace who first created a dance, especially if it goes viral.⁴⁷ Additionally, the distinction between a “social dance” and a choreographic work may bar many of these creations from gaining protection because they are created and shared in a social manner (on social media platforms), are typically shorter in length, and are often less complex than classic choreographic pieces, like ballets.⁴⁸ Unfortunately, copyright law has not evolved to comport with this modern type of choreography, leaving many creators without protection.⁴⁹ Therefore, copyright law must be revised not only for the protection of traditional choreographers, but for the modern choreographers as well.

⁴¹ Hannah Joy Ellis, *The Intersection Between Digital and Dance*, UNIV. OF WYO. LIBRARIES (Dec. 2020), https://wyoscholar.uwyo.edu/articles/thesis/Intersection_Between_Digital_and_Dance_The_Digital_Environment_s_Impact_on_the_Arts_The/13701400?file=26320048. “The digital environment has provided a platform for virtual performances, online classes, dance influencers, along with a new form of online aesthetic.” *Id.*

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See* Marie Fol, *Virtualized Dance? Digital shifts in artistic practices*, EUROPEAN DANCE NETWORK (Aug. 2021), https://www.ednetwork.eu/uploads/documents/63/EDN_Virtualized%20Dance%20Full%20Publication.pdf.

⁴⁵ Jill Vasbinder, *Laying claim to dance isn’t as straightforward for TikTok creators*, QUARTZ (July 26, 2021), <https://qz.com/2038061/common-law-copyright-is-not-enough-to-protect-tiktok-creators/>.

⁴⁶ *Id.*

⁴⁷ *Id.* (“TikTok posts aren’t timestamped. Posts appear in a user’s feed in order of popularity, not chronologically. Identifying who posted the content first is tricky.”).

⁴⁸ *See* Van Camp, *supra* note 18.

⁴⁹ *Id.*

With so many hurdles to jump over for choreographers to earn simple rights, it is time to re-evaluate the process of copyright protection for dance. In part A, this comment will discuss the history of copyright law and choreography. Part B will analyze the requirements copyright has placed on choreography and the struggles courts face in applying them. Part C will discuss the spread of online choreography and the difficulties these choreographers face regarding copyright protection. Part D will discuss additional reasons why choreographers are not seeking copyright protection. Part E will discuss the barriers choreographers face in proving infringement, and Part F will conclude with possible solutions.

II. HISTORY AND BACKGROUND

A. *History Of The Dance Industry And Copyright*

One goal of copyright law is to protect and promote creativity: if artists can reap financial benefits when others use their work, it will incentivize artists to create.⁵⁰ This protection is especially important for not-as-lucrative industries like dance.⁵¹ Dance companies spend months, even years, creating and rehearsing a performance.⁵² They then monetarily benefit almost exclusively from performances.⁵³ Unfortunately, often companies, especially smaller ones, do not receive high turnouts for their

⁵⁰ *Id.*

⁵¹ See Lightsey Darst, *The Poorest Art: Dance and Money*, HUFFPOST (June 1, 2012, 3:00 PM), https://www.huffpost.com/entry/dancer-income-wages-lifestyle-_b_1556794; see also Dalton Valerio, *Dance workers in search of liveable wages*, THE DAILY CALIFORNIAN (Oct. 22, 2021), <https://www.dailycal.org/2021/10/22/dance-workers-in-search-of-liveable-wages/> (“The struggling artist narrative has been exhausted to threads, laying bare the truth of the industry: It’s not sexy to be poor. Dance workers are particularly marginalized, experiencing median wages of \$17.99 per hour here in the Bay Area—many of them working less than full time—where a salary of \$111,136 barely supports a family of four.”).

⁵² See *Choreographer*, *supra* note 1.

⁵³ See Deasee Phillips, *Let’s get to the Pointe: Ballet and Business*, BUSINESS TODAY (Aug. 24, 2017), <https://journal.businesstoday.org/bt-online/2017/lets-get-to-the-pointe-ballet-and-business> (discussing the importance of performances, and how companies may have to “sacrifice their elite art form and put on performances that are more accessible to the average person” to meet their bottom line).

performances.⁵⁴ Whether it is due to a lack of interest, expensive tickets, or some other reason—dance patrons are sparse.⁵⁵ For instance, in a study conducted by Statista only 5% of eighteen to twenty-nine-year-olds, 5% of thirty to forty-nine-year-olds, and 2% of fifty to sixty-four-year-olds went to dance performances in 2018.⁵⁶ This meager attendance results in a major lack of cash flow for dancers—the average hourly pay in 2023 for dancers and choreographers is twenty dollars.⁵⁷ Compare this with the average hourly income of full-time wage and salary workers in the fourth quarter of 2022, which was just over twenty-seven dollars.⁵⁸ To make matters worse, the COVID-19 pandemic hit the dance industry hard, primarily because the government put restrictions on events—such as dance performances—and closed non-essential businesses.⁵⁹ Many dancers were forced to hang up their pointe shoes and practice pirouettes in their living rooms until the world reopened.⁶⁰ In 2020, 45.6% of dancers and choreographers reported being unemployed, while only 4.9% of the general professional population was unemployed.⁶¹ Now companies are once again permitted to rehearse and perform, but after more than two

⁵⁴ Courtney Huckabay, *Growing Attendance for Ballet, the Performing Arts*, SALESFUEL, <https://salesfuel.com/growing-attendance-ballet-performing-arts/> (last visited March 9, 2022) (“The latest AudienceSCAN survey revealed only 8.4% of Americans plan to attend a ballet or other live artistic dance performance in the next 12 months.”).

⁵⁵ *See id.*

⁵⁶ Alexander Kunst, *Share of Americans who attended dance or ballet performances 2018, by age*, STATISTA (Jan. 21, 2020), <https://www.statista.com/statistics/227489/dance-or-ballet-performance-visitors-usa/>.

⁵⁷ *Average Dancer Hourly Pay*, Payscale (Oct. 18, 2021), https://www.payscale.com/research/US/Job=Dancer/Hourly_Rate; Hourly_Wage_for_Choreographer_Salary_in_the_United_States, SALARY, <https://www.salary.com/research/salary/benchmark/choreographer-hourly-wages> (last visited Feb. 17, 2022).

⁵⁸ U.S. DEP’T OF LABOR, *Usual Weekly Earnings of Wage and Salary Workers Fourth Quarter 2021*, BUREAU OF LABOR STATISTICS (Jan. 19, 2022), <https://www.bls.gov/news.release/pdf/wkyeng.pdf>. (figure found by converting \$1,085 per week to the respective per hour rate).

⁵⁹ Mary Anne Carter, *The Art of Reopening: A Guide to Current Practices Among Arts Organizations During COVID-19*, NATIONAL ENDOWMENT FOR THE ARTS (Jan. 2021), <https://www.arts.gov/sites/default/files/The%20Art-of-Reopening.pdf>.

⁶⁰ *See Segundo, supra* note 3.

⁶¹ *Id.*

years without business, many are struggling to gather the resources necessary to begin performing again.⁶²

Choreographers need to supplement their incomes now, more than ever, as part of an already-struggling industry hit even harder by the pandemic.⁶³ One way they can do so is through intellectual property law. Intellectual property protection provides several economic rights to choreographers, such as the right to reproduce or make copies of their work, prepare derivative works, distribute copies by sale or other transfers, perform the work publicly, and display a copy of the work by means of a film, slide, or television image.⁶⁴ These rights belong exclusively to the choreographer, but can be sold to others who want to use the work.⁶⁵ Once a claim is successful, the copyright lasts the choreographer's life and an additional fifty years after their death.⁶⁶ They not only receive financial benefits when another person uses their work, but they also get personal credit for the time and energy they put into their creations.⁶⁷ Unfortunately, it took centuries for copyright to even cover the subject matter of choreography.⁶⁸

American copyright law traces its origins to England, specifically with the introduction of the printing press in the late fifteenth century.⁶⁹ To control the publication of books, the Licensing Act of 1662 granted English printers a monopoly on publishing.⁷⁰ In 1710, the Parliament enacted the Statute of Anne, which set the foundation for the principles of copyright for authors.⁷¹ Across the pond, copyright law was then incorporated into Article I, Section 8 of the United States Constitution, which states: "[T]he Congress shall have power . . . to promote the

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Nicholas Arcomano, *The Copyright Law and Dance*, THE NEW YORK TIMES (Jan. 11, 1981), <https://www.nytimes.com/1981/01/11/arts/the-copyright-law-and-dance.html>.

⁶⁵ Arcomano, *supra* note 64.

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ Alison Hall, *65th Anniversary of the First Copyrighted Choreography—Although Not Copyrighted as Choreography*, LOC (Aug. 16, 2017), <https://blogs.loc.gov/copyright/2017/08/copyrightchoreography/>.

⁶⁹ *Copyright Timeline*, *supra* note 68.

⁷⁰ *Id.*

⁷¹ *Id.*; *see also* Hollaar, *supra* note 68.

progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”⁷² The Copyright Act of 1790 was modeled on the Statute of Anne and allowed protection for maps, books, and charts.⁷³ Later, musical compositions, photographs, paintings, sculptures, and drawings were covered.⁷⁴ Despite these various revisions, none touched on the incorporation of dance choreography until 1909.⁷⁵

Although choreography was included in the 1909 Copyright Act, it was only protectible “if it told a story, developed or characterized an emotion, or otherwise conveyed a dramatic concept or idea.”⁷⁶ Therefore, to protect their work, choreographers had to mold their creations into what could be deemed “dramatic compositions.”⁷⁷ This was narrow in scope and unrealistic because much choreography—defined as “the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole”⁷⁸—is abstract and experimental.⁷⁹ Each choreographer has a unique process, and each work is one-of-a-kind.⁸⁰ Forcing choreographers to convey a recognizable story robs them of their creative freedom.⁸¹ A choreographer’s aim is to essentially manifest their creative visions through the human body.⁸² The creative process often

⁷² *Copyright Timeline*, *supra* note 68; U.S. Const. Art. I, Sec. 8.

⁷³ *Id.*

⁷⁴ Hollaar, *supra* note 68.

⁷⁵ *Horgan v. MacMillian, Inc.*, 789 F.2d 157, 160 (2d Cir. 1986).

⁷⁶ *Id.*

⁷⁷ *Abitabile & Picerno*, *supra* note 9.

⁷⁸ *Copyright Registration of Choreography and Pantomime*, U.S. COPYRIGHT OFF. 1, 1, <https://www.copyright.gov/circs/circ52.pdf> (last modified Mar. 2021).

⁷⁹ See Jessica Gayo & Lili Zecevic, *Everything You Need to Know About Contemporary Dance*, INQUIRER.NET (Feb. 26, 2021, 9:14 AM), <https://usa.inquirer.net/64475/everything-you-need-to-know-about-contemporary-dance>. (discussing how contemporary dance was born from traditional ballet, but became so popular because of the freedom of movement it allows dancers).

⁸⁰ See Van Camp, *supra* note 18.

⁸¹ *Id.*

⁸² Melissa Anduiza, *The Choreographic Process*, KNIGHT FOUNDATION (Jan. 26, 2015), <https://knightfoundation.org/articles/the-choreographic-process/>; see also Krystina Lopez de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 JEFFREY S. MOORAD SPORTS L. J. 139, 145 (2004), <https://digitalcommons.law.villanova.edu/mslj/vol11/iss1/5> (“Today, the work

begins when a choreographer is inspired by an idea, shape, emotion, object, place, piece of music, etc.⁸³ Then, they will work with a variety of movements to bring that inspiration to life.⁸⁴ Sometimes, a choreographer will simply begin moving to a piece of music.⁸⁵ Other times, a choreographer will share their inspiration with their dancers and ask them to improvise.⁸⁶ Or, a choreographer will draw inspiration from the dancers working with them.⁸⁷ Eventually, choreographers combine movements to complete a piece.⁸⁸ After that, rehearsals begin and choreographers will often make numerous changes as the rehearsal process continues.⁸⁹ Once they are finally satisfied, performances will begin.⁹⁰ In large part, choreographers choreograph because the creative process allows this freedom of expression, as well as an outlet to express unique ideas and abstract concepts.⁹¹ Thus, most choreographers resent being forced to tell a story, and avoid the copyright process as a result.⁹² Agnes de Mille framed the issue perfectly: “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.”⁹³

The exclusion of non-storytelling choreography is often attributed to the fact that Congress grants copyright protection when it deems an art

may be more abstract, centering on the choreographer’s interpretation of a thought, shape, idea, or emotion through movement.”).

⁸³ Lopez de Quintana, *supra* note 82.

⁸⁴ *Id.* at 145–46.

⁸⁵ See Kirsten Bodensteiner, *Music as Dance’s Muse: How Music Influenced the Steps of Four American Choreographers*, THE KENNEDY CENTER (Jan. 24, 2022), <https://www.kennedy-center.org/education/resources-for-educators/classroom-resources/media-and-interactives/media/dance/music-as-dances-muse/>. (“For choreographer Mark Morris, it all starts with the music. He creates a dance when a piece of music inspires him. If the music makes him visualize movement phrases, he decides to make a dance to it.”).

⁸⁶ See Lopez de Quintana, *supra* note 82, at 146.

⁸⁷ See *Choreographer*, *supra* note 1 (“Some choreographers will work closely with their dancers in devising movement material, drawing on the dancers individual styles and creativity.”).

⁸⁸ *Id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See Anduiza, *supra* note 82.

⁹² See Arcomano, *supra* note 64.

⁹³ *Id.*

form beneficial to society.⁹⁴ Until the second half of the twentieth century, Congress did not view dance choreography as beneficial to the public.⁹⁵ Books and motion pictures were eligible for protection because they were deemed “useful” in the eyes of Congress, as they were stories that taught lessons.⁹⁶ Dance was viewed as not being useful likely because it was not popular or well-understood at the time.⁹⁷ An ironic example is that George Balanchine was rejected when he attempted to gain protection for his ballet, *Symphony in C*.⁹⁸ The abstract nature of the ballet meant that it did not fulfill the requirements of being either a dramatic or dramatic-musical composition, and thus, could not gain protection.⁹⁹ However, when Balanchine resubmitted the same piece of work as a motion picture, it swiftly gained copyright protection.¹⁰⁰ This demonstrates how restrictive the story-telling requirement was on choreographers.¹⁰¹ As a result of such requirements, many choreographers were unable to seek copyright protection.¹⁰² Instead, they relied on the tradition of attributing “credit” to an original choreographer within the community.¹⁰³ Additionally, choreographers would utilize contract law with licensing contracts when others desired to perform a piece of their choreography.¹⁰⁴

In the 1960s, dance became much more prevalent in America during a period known as the “dance boom,” which lasted until the 1980s.¹⁰⁵ The country experienced huge growth in dance companies, as

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Abitabile & Picerno, *supra* note 9, at 41.

⁹⁷ Katie M. Benton, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 68 (2008).

⁹⁸ Abitabile & Picerno, *supra* note 9, at 41.

⁹⁹ *Id.* at 41–42.

¹⁰⁰ *Id.* at 42.

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ Benton, *supra* note 97, at 71–72.

¹⁰⁴ *Id.* at 72.

¹⁰⁵ *Id.* at 77; *see also* Anna Kisselgoff, *Dance View: Has the Dance Boom Run Its Course*, THE NEW YORK TIMES (Mar. 3, 1985), <https://www.nytimes.com/1985/03/03/arts/dance-view-has-the-dance-boom-run-its-course.html>. (discussing how, by 1985, the “phenomenal increase in activity and audiences within the field since the 1960’s ha[d] leveled off” due possibly to the cuts in government and foundation funds).

well as dance fans.¹⁰⁶ While classical ballet was the former leader in the dance community, modern dance gave it a run for its money during this period.¹⁰⁷ These modern dance companies presented their work generally by touring, which helped to spread appreciation and awareness of the new dance form.¹⁰⁸ With the help of modern choreographers who pushed the boundaries, like Martha Graham, Paul Taylor, and Merce Cunningham, dance captured the public's attention in a new way, acting as part of the counterculture movement.¹⁰⁹ The government reacted to this bright new spotlight on dance by creating the National Endowment for the Arts in 1965, which provided financial support to the industry.¹¹⁰

Although this revolutionary time was exciting and inspiring, this new attention on the industry also highlighted what was lacking within it, specifically, the need for choreographers to gain legal protection of their work.¹¹¹ One choreographer in particular, Agnes de Mille, became a loud voice in the push for change.¹¹² She pleaded for "some chance to protect our basic rights" and urged the Copyright Office to create an independent category for choreography.¹¹³ De Mille was affected personally by the lack of protection after creating choreography for the Rodgers and Hammerstein musical *Oklahoma*.¹¹⁴ She was paid \$15,000 for her work,

¹⁰⁶ THOMAS SMITH, NAT'L ENDOWMENT FOR THE ARTS, RAISING THE BARRE: THE GEOGRAPHIC, FINANCIAL, AND ECONOMIC TRENDS OF NONPROFIT DANCE COMPANIES, RESEARCH DIV. REPORT NO. 44, at 2 (2003), <http://www.nea.gov/research/RaisingtheBarre.pdf> [hereinafter *Raising the Barre*].

¹⁰⁷ *Id.*; see also Kisselgoff, *supra* note 105 ("The prima ballerina seems an extinct species.").

¹⁰⁸ *Raising the Barre*, *supra* note 106.

¹⁰⁹ *Id.*; see also Reina Potaznik, Unusual Dance Spaces 2, 12 (2007) (B.A. thesis, Columbia University) (on file with Columbia University Libraries), <https://academiccommons.columbia.edu/doi/10.7916/D8QJ7P2W>. "The experimental culture of the 1960s helped to foster a similar creative sentiment among the avant-garde choreographers of that decade." *Id.*

¹¹⁰ *Raising the Barre*, *supra* note 106, at 3; Nat'l Endowment for the Arts, *What is the NEA?*, <https://www.arts.gov/about/what-is-the-nea> (last visited Sep. 4, 2022).

¹¹¹ Arcomano, *supra* note 64.

¹¹² *Id.*

¹¹³ Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. MIA. L. REV. 287, 289 (1984), <https://repository.law.miami.edu/umlr/vol38/iss2/5>.

¹¹⁴ See Benton *supra* note 97.

but has received no royalties since, while Rodgers and Hammerstein continue to collect funds to this day.¹¹⁵ De Mille's voice, along with those of many others, finally sparked change.¹¹⁶

In 1976, the Copyright Office responded to the demands of the dance industry.¹¹⁷ It finally deemed choreography a "separate viable form of art" and allowed choreographers to gain copyright protection even without dramatic, storytelling content.¹¹⁸ The Act states: "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."¹¹⁹ Works of authorship include pantomimes and choreographic works.¹²⁰ Although the 1976 Copyright Act relaxed its requirements to gain protection in order to include choreography, it did not provide definitions for copyrightable choreographic works, forcing courts to make their own decisions on what is and what is not deserving of protection.¹²¹ Due to this confusion, the Copyright Office defined choreography as "the composition and arrangement of dance movements and patterns usually intended to be accompanied by music . . . to be protected by copyright . . . choreography need not tell a story or be presented before an audience . . . a related series of dance movements and patterns organized into a coherent whole."¹²² Unfortunately, this definition has proved too vague in practice.¹²³

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Abitabile & Picerno, *supra* note 9, at 43.

¹¹⁸ *Id.*

¹¹⁹ 17 U.S.C. § 102

¹²⁰ U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME, (March 2021), <https://www.copyright.gov/circs/circ52.pdf>.

¹²¹ Jessica Goudreault, *Copyrighting the Quotidian: An Analysis of Copyright Law for Postmodern Choreographers*, 39, CARDOZA LAW REV. 751, 755 (2018).

¹²² *Horgan v. Macmillan*, 789 F.2d 157, 161 (2d Cir. 1986) (quoting U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 450 (1984)).

¹²³ See *id.*

One case that illustrates the need for Congress to provide a more detailed definition of “choreography” is *Horgan v. MacMillan*.¹²⁴ That case involves the renowned late choreographer George Balanchine and his famous ballet, *The Nutcracker*.¹²⁵ He received copyright protection for his work in 1981 under the Copyright Act of 1976.¹²⁶ In 1985, MacMillan released a children’s book titled *The Nutcracker: A Story & A Ballet*, which included photos of performances, dancers, and rehearsals.¹²⁷ Barbara Horgan, the executor of Balanchine’s estate, accused MacMillan of copyright infringement because of the photos.¹²⁸ The District Court denied Horgan’s application for a temporary restraining order and a preliminary injunction because the photographs were not a type of work eligible for protection.¹²⁹ Since they were just photographs, the District Court said the choreography could not be reproduced from them.¹³⁰ This decision was criticized by industry members who said that much can be gleaned from photographs—the pictures in the book could, in fact, be used to recreate *The Nutcracker*.¹³¹ The Second Circuit also critiqued the district court’s conclusion regarding the ability to reproduce, and said a “snapshot of a single moment in a dance sequence may communicate a great deal.”¹³² Seemingly, the Justices in that case were forced to use their own judgments about what should and should not be protected as choreography.¹³³

B. Copyright Requirements For Choreography

The Copyright Office did provide more guidance in the form of three requirements which must be met for a work to receive protection.¹³⁴

¹²⁴ *Id.* at 157–60.

¹²⁵ *Id.* at 158.

¹²⁶ *Id.*

¹²⁷ *Id.* at 158–59.

¹²⁸ *Horgan v. Macmillan*, 789 F.2d 157, 159–60 (2d Cir. 1986).

¹²⁹ *Id.* at 160.

¹³⁰ *Id.*

¹³¹ See Ronald Smothers, *Dance Copyright Case is Reopened On Appeal*, N.Y. TIMES (April 30, 1986), <https://www.nytimes.com/1986/04/30/books/dance-copyright-case-is-reopened-on-appeal.html>.

¹³² *Id.* (quoting *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986)).

¹³³ See *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986).

¹³⁴ Elijah Hack, *Milly Rocking Through Copyright Law: Why the Law Should Expand to Recognize Dance Moves as a Protected Category*, 88 UNIV.

First, the choreography must be a work of authorship, second, it must be an original creation, and third, it must be fixed in a tangible medium of expression.¹³⁵ Unfortunately, these requirements are vague and have not been applied uniformly by courts.¹³⁶

1. Originality

Choreography must be deemed an “original work” to be protected.¹³⁷ This means the choreographer “must [independently] create the work with [his or her] own skill, labor, or judgment.”¹³⁸ The Court in *Feist Publications v. Rural Telephone Service* set the standard for originality: first, the work is the independent creation of the choreographer; and second, the work exhibits some degree of creativity.¹³⁹

The meaning of “original” as it applies to choreography is unclear.¹⁴⁰ Copyright law’s interpretation of the requirement is that a work “had its origin in the skill, labor, or judgment of its creator.”¹⁴¹ However, the courts have often applied a broad standard to this prong.¹⁴² One example is a piece of choreography created by JaQuel Knight for Beyonce’s popular song “Single Ladies.”¹⁴³ Although the work was

CIN. L. REV. 637, 642–43 (Jan. 2020), <https://scholarship.law.uc.edu/uclr/vol88/iss2/9>.

¹³⁵ Ali Johnson, *Copyrighting TikTok Dances: Choreography in the Internet Age*, 96 WASH. L. REV. 1225, 1242 (2021).

¹³⁶ See Hack, *supra* note 134.

¹³⁷ See Johnson, *supra* note 135.

¹³⁸ See Lopez de Quintana, *supra* note 82, at 155 (quoting Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 278 (1999)).

¹³⁹ Adelaide Saucier, *Dance and Copyright: Legal “Steps” for Performers*, CTR. FOR ART LAW (Oct. 30, 2018), <https://itsartlaw.org/2018/10/30/dance-and-copyright-legal-steps-for-performers/>.

¹⁴⁰ See generally *id.*; Anduiza, *supra* note 82.

¹⁴¹ Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 UNIV. MIAMI L. REV. 287, 300 (1984), <https://repository.law.miami.edu/umlr/vol38/iss2/5>.

¹⁴² See Saucier, *supra* note 139.

¹⁴³ Sarah Alberstein & Michelle Mancino Marsh, *Put a © on It: Choreography for Beyonce’s Single Ladies Granted Copyright Registration*, JD SUPRA (May 21, 2021), <https://www.jdsupra.com/legalnews/put-a-c-on-it>.

largely inspired by Bob Fosse's distinctive dance style, and in particular his routine titled "Mexican Breakfast," the court found that Knight's work possessed enough of an individual spark to be deemed original.¹⁴⁴ However, some dancers and choreographers in the industry claimed Knight had in fact stolen the moves of Fosse.¹⁴⁵ In response, Knight told *Billboard Magazine*, "[y]ou see the three ladies, you see the inspiration—but the funk, the stylized movement, they're extremely different. I mean, how I got here as an artist is being inspired by those who came before me. That's how any of us get anywhere."¹⁴⁶ Although the court determined that Knight's work was different than Fosse's due to his contrasting style, it is possible that many courts would not make this type of determination, leading to further inconsistency within the system.¹⁴⁷

Another example, also involving Beyonce, regards Belgian Avant Garde artist Anna Teresa De Keersmaeker.¹⁴⁸ De Keersmaeker claimed that Beyonce, in her music video "Countdown," plagiarized De Keersmaeker's dances.¹⁴⁹ Beyonce's music video utilized nearly identical dance moves, costumes, and set designs which are strikingly like De Keersmaeker's *Rosas Danst Rosas* and *Achterland*.¹⁵⁰ De Keersmaeker claimed Beyonce stole her work, while Beyonce said she was simply inspired by it.¹⁵¹ This showed the gray areas of what is protected: "Does

choreography-for-beyonce-8009489/; see also Rebecca Milzoff, *Inside 'Single Ladies' Choreographer JaQuel Knight's Quest to Copyright His Dances*, *BILLBOARD* (Nov. 5, 2020), <https://www.billboard.com/music/music-news/jaquel-knight-beyonce-megan-thee-stallion-billboard-cover-story-interview-2020-9477613/>.

¹⁴⁴ See Milzoff, *supra* note 143.

¹⁴⁵ See *id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ *Beyonce Danst Rosas*, CTR. FOR THE ART OF PERFORMANCE UCLA (Nov. 12, 2015), <https://cap.ucla.edu/blog/beyoncedanstrosas/>.

¹⁴⁹ Vasbinder, *supra* note 45.

¹⁵⁰ *Copyright Infringement in Beyonce's "Countdown"?*, CENTER FOR ART LAW (Oct. 11, 2011), <https://itsartlaw.org/2011/10/11/copyright-infringement-in-beyonces-countdown/>.

¹⁵¹ James C. McKinley Jr., *Beyonce Accused of Plagiarism Over Video*, *THE NEW YORK TIMES* (Oct. 10, 2011, 5:50 PM), <https://artsbeat.blogs.nytimes.com/2011/10/10/beyonce-accused-of-plagiarism-over-video/>. De Keersmaeker told Studio Brussel, "this is stealing," while Beyonce stated: "Clearly, the ballet 'Rosas danst Rosas' was one of many

performing someone else’s dance movements in a new setting—for an audience who may not have any connection or knowledge of its origins—make it OK? Does this make it a new work?”¹⁵²

Although Keersmaeker decided against partaking in the judicial system, and instead used the opportunity to create an open conversation regarding appropriation within the art community, this instance demonstrates the muddy waters of “originality” in dance.¹⁵³ Beyonce claims she was inspired by Keersmaeker,¹⁵⁴ like when Knight claimed he was inspired by Fosse.¹⁵⁵ Neither admits to copying work.¹⁵⁶ When then, is a work not original? This is unclear to those within the industry, but it is even more unclear to judges, who likely do not have experience in choreographing, when applying this element for copyright claims.¹⁵⁷ This last element of the analysis needs a stronger meaning to create a smoother and clearer process for choreographers when obtaining their copyrights.¹⁵⁸

2. Work of Authorship

In order to qualify as a work of authorship, the creation must qualify as a “choreographic work.”¹⁵⁹ The issue is that there is no clear definition in the Act for work of authorship, so courts have applied various meanings.¹⁶⁰ One clear element, however, is that choreographic works do not include social dance steps or simple routines, like the first position in ballet or the hustle.¹⁶¹ Most helpful to this analysis is the Copyright Office’s Compendium II.¹⁶² It states:

Choreography is the composition and arrangement of dance movements and patterns . . . Dance is static and

references for my video ‘Countdown.’ It was one of the inspirations used to bring the feel and look of the song to life.” *Id.*

¹⁵² Vasbinder, *supra* note 45.

¹⁵³ Johnson, *supra* note 135, at 1247.

¹⁵⁴ McKinley, *supra* note 151.

¹⁵⁵ Johnson, *supra* note 135, at 1247.

¹⁵⁶ *See id.*; McKinley, *supra* note 151.

¹⁵⁷ *See* Van Camp, *supra* note 18.

¹⁵⁸ *See* Johnson, *supra* note 135, at 1243.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1243–44.

¹⁶¹ *Id.*

¹⁶² *See* Compendium of US Copyright Office Practices, II (1984).

kinetic successions of bodily movement in certain rhythm and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.¹⁶³

To qualify as a work of authorship, a creation must qualify as a choreographic work rather than as a social dance step.¹⁶⁴ Unfortunately, this step presents difficulty in its application because there is no bright line distinction between the two types of movements.¹⁶⁵ In *Brantley v. Epic Games, Inc.*,¹⁶⁶ the court discussed this first element when it considered whether Epic Games infringed upon Brantley's copyright protection.¹⁶⁷ The plaintiffs alleged that the video game company appropriated the "Running Man," a dance it allegedly created and popularized, in its video game *Fortnite*.¹⁶⁸ The court discussed the blurry line between dance steps and choreographic works.¹⁶⁹

[T]he dividing line between copyrightable choreography and uncopyrightable dance is a continuum, rather than a bright line. At one extreme are ballets, modern dances, and other complex works that represent a related series of dance movements and patterns organized into a coherent compositional whole. At the other extreme are social dances, simple routines, and other copyrightable movements. Many works fall somewhere in between.¹⁷⁰

The court decided that the running man could be either a piece of choreographic work or a social step.¹⁷¹ Regarding the former, the U.S.

¹⁶³ *Id.*

¹⁶⁴ Johnson, *supra* note 135, at 1242.

¹⁶⁵ See Van Camp, *supra* note 18.

¹⁶⁶ *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616 (D. Md. 2020).

¹⁶⁷ *Id.* Although the court did not need to decide whether the piece of choreography, "Running Man," fell within the category of choreographic works because it was discussing copyright preemption rather than protection, its discussion of this point is helpful. *Id.*

¹⁶⁸ *Id.* "Fortnite is a free-to-play online multiplayer video game which supports up to one hundred players during a single game . . . In July 2018, Epic Games produced a new emote which was called the 'Running Man' emote." *Id.* at 619–20.

¹⁶⁹ *Id.* at 623.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

Copyright Office defines choreographic work as “rhythmic movements in a defined space” which are performed to music before an audience.¹⁷² Regarding the latter, the court defined social step as a relatively short piece “performed by thousands of members of the public.”¹⁷³ Overall, the court decided the running man was more like a choreographic work and said it satisfied the first prong.¹⁷⁴

Contrarily, when Alfonso Ribeiro attempted to copyright a dance he performed on *The Fresh Prince of Bel-Air*, dubbed “the Carlton,” the court ruled that it failed to meet the standards of a choreographic work because it was an individual, simple movement.¹⁷⁵ It is unclear what separates this from the running man, as they are both individual movements and not full choreographic pieces like George Balanchine’s *Nutcracker*.¹⁷⁶ Members of the public often mimic both because they are relatively short in length and simple in complexity.¹⁷⁷ These two decisions demonstrate how subjective this part of the copyright analysis is.¹⁷⁸ Because there are no hard definitions for either type of work, it is up to each court’s judgment to determine whether a specific creation falls into the category of choreographic work or social dance step.¹⁷⁹ This creates confusion within the judicial system and among choreographers.¹⁸⁰ Thus, it is difficult to distinguish between the two, and courts face ambiguous, seemingly arbitrary precedents.¹⁸¹

Yet another iteration of this analysis occurred in *Pellegrino v. Epic Games*.¹⁸² There, a musician brought a claim against a video game company claiming that the company misappropriated his likeness and

¹⁷² *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616 (D. Md. 2020) at 623.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Gene Markin, *Alfonso Ribeiro Denied Copyright for the “Carlton Dance,”* N.J. LAW BLOG (Feb. 25, 2019), <https://www.njlawblog.com/2019/02/articles/intellectual-property/alfonso-ribeiro-denied-copyright-carlton-dance/>.

¹⁷⁶ Compare *Brantley*, 463 F. Supp. 3d at 619, with Markin, *supra* note 175.

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Pellegrino v. Epic Games, Inc.*, 451 F. Supp. 3d 373 (E.D. Pa. 2020).

trademark concerning a specific dance he did in all his saxophone performances.¹⁸³ The court found that because choreography is a subset of dance, as it uses dance steps in its creation, the “signature move” is the appropriate subject matter of copyright law and satisfies this prong.¹⁸⁴ This result broadened the distinction between social dance steps and choreographic works even further.¹⁸⁵ Some may argue it even eliminated the distinction because any social dance step could be a move used in a longer piece of choreography.¹⁸⁶

Courts are possibly moving towards eliminating the distinction as more choreographers claim copyright with the rise of technology.¹⁸⁷ Video game producers, particularly Epic Games, have laid claim to dance steps they did not create and have reaped the benefits.¹⁸⁸ This caused a series of legal disputes.¹⁸⁹ With *Fortnite*'s in-game "emotes," the company has taken choreographers' work, influenced players across the world to mimic it, and enjoyed substantial financial benefits,¹⁹⁰ without crediting the creators.¹⁹¹ Further, these emotes are no minor ingredient in the game.¹⁹²

183 *Id.*

184 *Id.*

185 *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ AJ Park, *The dance-offs: a (partial) resolution to Fortnite's slurry of copyright lawsuits*, Lexology (Nov. 17, 2020), <https://www.lexology.com/library/detail.aspx?g=32bcca55-88e7-4b47-92de-52e8bfc5762e>.

188 *Id.*

189 *Id.*

¹⁹⁰ Sarah Kaufman, *The dances in 'Fortnite' have become nearly as contagious as the game*, THE WASHINGTON POST (Sept. 10, 2018, 1:48 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/09/10/the-dances-in-fortnite-have-become-nearly-as-contagious-as-the-game/>. According to a report by SuperData Research, in 2019, Fortnite brought in \$1.8 billion in revenue. Akhilesh Ganti, *How Does Fortnite Make Money?*, INVESTOPEDIA (Sept. 10, 2020), [https://www.investopedia.com/search in search bar for "How Does Fortnite Make Money?"; then click on hyperlink for "How Does Fortnite Make Money?" article](https://www.investopedia.com/search in search bar for)).

¹⁹¹ Morgan Sung, Choreographer sues Epic Games for using his copyrighted moved in a Fortnite emote, NBC NEWS (Apr. 14, 2022, 10:34 AM), <https://www.nbcnews.com/pop-culture/pop-culture-news/choreographer-sues-epic-fortnite-emote-kyle-hanagami-rcna23075>.

¹⁹² Nelson Le, an avid “Fortnite” player, told The Washington Post: “Without the emotes you wouldn’t have any fun.” Sarah Kaufman, *The dances in*

In fact, they are a major branding element, and some claim they are more popular than the game itself.¹⁹³ For example, the emote popularly known as “Swipe It,” from *Fortnite*’s Season 5,¹⁹⁴ was created by 2 Milly, a New York rapper.¹⁹⁵ 2 Milly dubbed his dance step the “Milly Rock” when it debuted with his single by the same name.¹⁹⁶ Without 2 Milly’s permission or knowledge, Epic Games included the dance step in its game, slapped another name on it, and made it much more popular than 2 Milly ever did.¹⁹⁷ As a result, 2 Milly filed a lawsuit for copyright infringement.¹⁹⁸ This provides an example of when copyright law should be expanded to protect social steps or dance moves because with its current structure, it encourages others to appropriate work.¹⁹⁹ This will discourage creativity and encourage big fish to take advantage of little fish. Whether the line is solidified, or the distinction is eliminated completely, it is important for courts to be consistent to provide clarity on whether a creation can withstand this hurdle.

3. Fixation

A work must be fixed in a tangible medium to be copyrightable.²⁰⁰ Pursuant to the Copyright Act, “A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it

‘Fortnite’ have become nearly as contagious as the game, THE WASHINGTON POST (Sept. 10, 2018, 1:48 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/09/10/the-dances-in-fortnite-have-become-nearly-as-contagious-as-the-game/>.

¹⁹³ *Id.*

¹⁹⁴ Porter Wells, *Fortnite Accused of Copying ‘Milly Rock’ Dance*, BLOOMBERG LAW (Dec. 5, 2018, 9:23 AM), <https://news.bloomberglaw.com/ip-law/fortnite-accused-of-copying-milly-rock-dance>.

¹⁹⁵ Andrew Dalton, *Rapper sues makers of video game ‘Fortnite’ over dance moves*, AP NEWS (Dec. 5, 2018), <https://apnews.com/article/83a8cc96651849609c52e4c0130a34e0>.

¹⁹⁶ *Id.*

¹⁹⁷ Black Brittain & Kyle Jahner, *‘Fortnite’ Creator Says ‘Milly Rock’ Dance Isn’t Protectable (I)*, BLOOMBERG LAW (Feb. 12, 2019, 10:52 AM), <https://news.bloomberglaw.com/ip-law/fortnite-creator-says-milly-rock-dance-isnt-protectable-1>.

¹⁹⁸ Hack, *supra* note 134, at 637.

¹⁹⁹ *See id.*

²⁰⁰ *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc.*, 380 F.3d 624 (2d Cir. 2004).

to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²⁰¹ This eliminates performances and improvisational dancing, as the former cannot be reproduced, and the latter is spontaneous.²⁰² There are two main methods to fix choreography in a tangible medium: one, to video record it; the other, to notate it.²⁰³ Unfortunately, two-dimensional video recording does not capture the intricacies of the three-dimensional nature of dance.²⁰⁴ Additionally, notation is expensive and time consuming and many within the dance industry believe it does a subpar job at truly emulating the character of a piece.²⁰⁵

Fixation is arguably the main reason why many choreographers have yet to seek copyright protection, even with the broadened law under the 1976 Act.²⁰⁶ Fixation is not a natural part of the choreographic process.²⁰⁷ Throughout dance’s history, dancers who perform the work have preserved choreography by teaching it to younger generations of dancers.²⁰⁸ However, copyright law does not allow for this method of preservation.²⁰⁹ This means that if a choreographer seeks copyright protection, they must take extra steps to have their creation memorialized.²¹⁰ There are two main options for these choreographers—

²⁰¹ 17 U.S.C. § 101.

²⁰² *See id.*

²⁰³ Johnson, *supra* note 135, at 1250.

²⁰⁴ *Id.*

²⁰⁵ *Id.*; *see also* Lakes, *supra* note 19, at 1855.

²⁰⁶ *See* Singer, *supra* note 141 at 301; *see also* 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, 941 (2006) (“[T]he fixation requirement presents a substantial obstacle to most choreographers.”).

²⁰⁷ *See* Van Camp, *supra* note 18 (“One legal commentator, Leslie Erin Wallis, has argued that the requirement for fixation is unreasonable for choreography, principally because it does not recognize the ways in which choreographers actually work.”).

²⁰⁸ Stephanie Wolf, *Dancer Preserves the Work of Black Choreographers, in One Video at a Time*, NPR (July 8, 2018, 5:36 PM), <https://www.npr.org/2018/07/08/626563460/dancer-preserves-the-work-of-black-choreographers-in-one-video-at-a-time> (“In dance, choreography is typically passed down generation to generation through personal contact.”).

²⁰⁹ *See* Van Camp, *supra* note 18.

²¹⁰ *Id.*

Laban Dance Notation or video recording.²¹¹ Unfortunately, neither are necessarily favorable in a choreographer's eyes.²¹²

Labanotation originated in the early twentieth century, when many dancers could read and understand the language.²¹³ However, over the years, the form has declined in popularity as dance became more innovative and complex.²¹⁴ Since Labanotation is now a little-known language,²¹⁵ choreographers must hire experts to assist them, which can be extremely costly.²¹⁶ Notation professionals typically charge up to fourteen hundred dollars for twenty minutes of ballet.²¹⁷ As many pieces can be much longer than that, notation gets expensive quickly.²¹⁸ Larger dance companies may have the funds for this, but smaller, lesser-known choreographers often do not.²¹⁹ Choreographers are among the lowest-paid artists,²²⁰ so notation is simply not an option for many of them.²²¹ Notation also does not sufficiently reflect the nuances of a piece, capture style or capture a dancer's interpretation of the choreography—all of which make a dance piece what it is.²²² There are so many variations of movement a

²¹¹ *Id.*

²¹² *Id.*

²¹³ See Rhonda Ryman, *Dance Notation, the Process of Recording Movement on Paper*, 4 DANCE RESEARCH 80 (1986) (reviewing ANN HUTCHINSON GUEST, *DANCE NOTATION, the Process of Recording Movement on Paper* (1984)).

²¹⁴ *Id.*

²¹⁵ Whitney Elaine Laemmli, *The Choreography of Everyday Life: Rudolf Laban and the Making of Modern Movement*, UNIV. OF PA. (2016), <https://repository.upenn.edu/edissertations/1823>; see also Anna Heyward, *How to Write a Dance*, THE PARIS REV. (Feb. 4, 2015), <https://www.theparisreview.org/blog/2015/02/04/how-to-write-a-dance/>.

²¹⁶ See Marcie Sillman, *How Does Choreography Survive? Check Out These Diagrams*, KUOW (Oct. 10, 2018, 7:04 AM), <https://www.kuow.org/stories/how-do-you-write-down-a-dance>.

²¹⁷ Johnson, *supra* note 135, at 1250.

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ Nat'l Endowment for the Arts, Artists and Other Cultural Workers: A Statistical Portrait (2019), https://www.arts.gov/sites/default/files/Artists_and_Other_Cultural_Workers.pdf.

²²¹ See Van Camp, *supra* note 18. "At the time of passage of the 1976 Copyright Revision, the cost of a notated score in Labanotation ranged from \$500 to \$3,000." *Id.* at 83 n.72.

²²² *Id.*

body can make, and a word or symbol simply cannot adequately represent them.²²³

On the other hand, film is more affordable, but it does not convey the three-dimensional nature of dance and does not provide enough detail for recreators to use.²²⁴ Performances are rarely identical to one another, even for the same piece of choreography.²²⁵ This is due to human error as well as stylistic choices made by the dancers which may change each time they perform.²²⁶ Therefore, the video recording may not truly represent the original choreography.²²⁷ Due to the added time, expense, and inaccuracy associated with the notation and film fixation methods, the Copyright Office should reevaluate the fixation requirement to make it more accessible to choreographers.

III. SOCIAL MEDIA AND CHOREOGRAPHY

With the rise of social media, creators have a plethora of outlets to share their creations.²²⁸ However, this is a double-edged sword, because people also have more opportunities to copy another's work and claim it as theirs.²²⁹ This is an especially prominent problem for TikTok

²²³ *Id.*

²²⁴ *Id.* at 68; Sillman, *supra* note 216.

²²⁵ See Van Camp, *supra* note 18, at 72–73.

²²⁶ Abitabile & Picerno, *supra* note 9. “The major drawback to this is that although less costly, videotape may not show the exact intentions of the choreographer.” *Id.* at 53.

²²⁷ *Id.*

²²⁸ Bob Marcotte, *Can social networks help us be more creative?*, UNIV. OF ROCHESTER (Dec. 9, 2020), <https://www.rochester.edu/newscenter/can-social-networks-help-us-be-more-creative-463492/>.

²²⁹ Maria Elena Galae, *Social Media Stifles Originality and Creativity*, MEDIUM (June 5, 2019), <https://medium.com/@galeamariaelena/social-media-stifles-originality-and-creativity-4-5-f9d3ef7f498d>. “The problem for some ‘artists’ today is that they stop at the very first stage, they just copy, they do not transform or combine, they do not venture into a creative idea of their own to develop their own piece of art.” *Id.*

creators.²³⁰ Today, there are one billion monthly active users worldwide.²³¹ TikTok allows users to film videos of themselves and utilize video editing and customization tools.²³² Users may perform comedy skits, magic tricks, lip dubbing, viral challenges, or anything else within community guidelines.²³³

One of the most prevalent types of content consists of dance choreography, dubbed “dance challenges,” on the app.²³⁴ These challenges consist of short dances to popular songs that TikTok users recreate and repost across the app.²³⁵ Due to the ease of creating and sharing, and the possibility of immense fame, many professional choreographers credit TikTok for their newfound success.²³⁶ In an interview with *Wired*, choreographer Greg Chapkis said, “Social media and TikTok changed everything in our industry . . . I was getting tagged in not just hundreds but thousands of videos with my choreography . . .”²³⁷ After creating a dance to “Con Calma” by Daddy Yankee ft. Snow, Chapkis’s online presence exploded.²³⁸ He now teaches sold-out dance classes around the world.²³⁹

Anyone, from professional choreographers to nine-year olds, can create a dance on the app that has the potential to go “viral.”²⁴⁰ For

²³⁰ TikTok is an incredibly popular video-sharing social media application that launched in the U.S. in 2018. Georgina Smith, *The History of TikTok: From Musical.ly to the Number 1 App in the World*, DEXERTO (May 8, 2021), <https://www.dexerto.com/entertainment/the-history-of-tiktok-1569106/>.

²³¹ L. Ceci, *TikTok Global Monthly Active Users (MAU) of TikTok Worldwide from January 2018 to September 2021*, STATISTA (Jan. 28, 2022), <https://www.statista.com/statistics/1267892/tiktok-global-mau/>.

²³² John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (March 10, 2019), <https://www.nytimes.com/2019/03/10/style/what-is-tiktok.html>.

²³³ *Id.*

²³⁴ Andria Moore & Palmer Haasch, *20 of the Most Viral Dances on TikTok, from ‘Corvette Corvette’ to the ‘Renegade,’* INSIDER (Feb. 5, 2021, 1:50 PM), <https://www.insider.com/tiktok-dances-renegade-say-so-and-more-19-top-2020-3>.

²³⁵ *Id.*

²³⁶ See Amelia Tait, *Meet the Choreographers Behind Some of TikTok’s Most Viral Dances*, WIRED (Oct. 8, 2020, 6:00 am), <https://www.wired.co.uk/article/tik-tok-dances>.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

instance, the most famous creator on TikTok, with over 144 million followers, was an everyday high schooler before rising to fame.²⁴¹ Charli D’Amelio, who trained as a competitive dancer throughout her childhood, found an outlet to share her talent and passion through TikTok.²⁴² In just under a year, the seventeen-year-old became a multimillionaire (her net worth is \$20 million).²⁴³ Now, D’Amelio has spread her wings wide, earning not just on TikTok, but on YouTube as well.²⁴⁴ Top that with Super Bowl commercials, a television series, a clothing line, and film debuts, making D’Amelio one of the world’s most famous teens.²⁴⁵ All this from creating a fifteen second dance routine on a social media app.

D’Amelio’s first viral video was a dance tutorial duet, and she continues to post her own choreography several times a day on the platform.²⁴⁶ Easily her most well-known video is of herself “dancing to the song ‘Lottery (Renegade)’ by the group K Camp.”²⁴⁷ “The Renegade” dance became so well-known that TikTokers around the country posted their own iterations.²⁴⁸ Although D’Amelio’s success demonstrates how TikTok has been beneficial to the dance industry, it also indicates how it has been detrimental. Unbeknownst to most before early 2020,

²⁴¹ Mehera Bonner & Kayleigh Roberts, *Charli D’Amelio’s Net Worth Is Basically Exploding Every Single Month*, COSMOPOLITAN (July 27, 2022), <https://www.cosmopolitan.com/entertainment/celebs/a33275435/charli-damelio-net-worth/>; see also Jasmine Washington, *Charli D’Amelio’s Massive Net Worth is Out of This World*, SEVENTEEN (July 29, 2022), <https://www.seventeen.com/celebrity/a38579794/charli-damelio-net-worth/>.

²⁴² Washington, *supra* note 241.

²⁴³ *Charli D’Amelio Net Worth*, CELEBRITY NET WORTH, <https://www.celebritynetworth.com/richest-celebrities/singers/charli-damelio-net-worth/> (last visited Feb. 20, 2022).

²⁴⁴ Washington, *supra* note 241.

²⁴⁵ *Id.*

²⁴⁶ Kat Tenbarger & Kieran Press-Reynolds, *Inside the Life of 17-year-old Charli D’Amelio, the Most Popular TikTok Star in the World Who Now Has Her Own TV Show and Clothing Line*, INSIDER (Sep. 24, 2021, 2:50 PM), <https://www.insider.com/charli-d-amelio-bio-how-old-tiktok-famous-renegade-super-bowl-2020#in-november-2019-charli-sold-tickets-for-her-first-meet-and-greet-5>.

²⁴⁷ *Id.*; see also *Charli D’Amelio Net Worth*, *supra* note 243.

²⁴⁸ Taylor Lorenz, *The Original Renegade: A 14-Year-Old in Atlanta Created One of the Biggest Dances on the Internet. But Nobody Really Knows That*, N.Y. TIMES, <https://www.nytimes.com/2020/02/13/style/the-original-renegade.html> (Aug. 28, 2021).

D’Amelio’s famous “Renegade” dance was actually created by another TikToker, fourteen-year-old Jalaiah Harmon.²⁴⁹

The nature of TikTok’s “dance challenges” is that users copy the creations of others, making the creations go viral.²⁵⁰ Often, it is not the original video of the creation that gains notoriety, but a subsequent iteration.²⁵¹ Jalaiah Harmon’s experience is one of the most notable examples of this.²⁵² Although Harmon’s “Renegade” choreography became so famous that teenagers were performing it “in the halls of high schools,” and celebrities like Kourtney Kardashian recorded themselves performing the well-known steps, Harmon was not the TikToker who received the credit.²⁵³ For months, Harmon attempted to get the attention she deserved, but she was not recognized nor accorded credit until after the moment had passed.²⁵⁴

Another instance where the original creator went unacknowledged occurred when Mya Johnson created a dance named “Up,” which went viral²⁵⁵. So viral that the routine made national television on *The Tonight Show Starring Jimmy Fallon*.²⁵⁶ However, the performer on the show was not the original creator.²⁵⁷ In fact, Johnson was not even informed that the dance would be performed on *The Tonight Show*.²⁵⁸ It was only when

²⁴⁹ *Id.*

²⁵⁰ Jessaline Tanjung, *How TikTok’s Viral Dance Challenges Taught Me More Moves than My Dancing Instructor*, DIGGIT MAG. (June 30, 2021), <https://www.diggitmagazine.com/articles/how-tiktok-s-viral-dance-challenges-taught-me-more-moves-my-dancing-instructor>.

²⁵¹ *See* Lorenz, *supra* note 248.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *See id.*; *see also* Maryclaire M. Farrington, *Viral for the Wrong Reasons: Credit or Copyright for Short Choreographic Works?*, WAKE FOREST L. REV. (Oct. 29, 2021), <http://www.wakeforestlawreview.com/2021/10/viral-for-the-wrong-reasons-credit-or-copyright-for-short-choreographic-works/>.

²⁵⁵ Brit Dawson, *TikTok Dance Creators Are Fighting for the Copyrights to Their Work*, DAZED (Aug. 2, 2021), <https://www.dazeddigital.com/science-tech/article/53713/1/tiktok-dance-creators-are-fighting-for-the-copyrights-to-their-work>.

²⁵⁶ Georgina Smith, *Mya Johnson Responds to Addison Rae Using Her TikTok Dance on The Tonight Show*, DEXERTO, <https://www.dexerto.com/entertainment/mya-johnson-responds-to-addison-rae-using-her-tiktok-dance-on-the-tonight-show-1545850/> (Apr. 2, 2021).

²⁵⁷ *Id.*

²⁵⁸ *See id.*

Johnson saw her routine on television that she realized she should receive credit for her work.²⁵⁹ In an interview with *Dexerto*, Johnson said, “I feel like it is very important for us to get our credit because we are very good creators that are very overlooked in what we do.”²⁶⁰

Harmon and Johnson are not alone in not receiving credit for their work.²⁶¹ Other choreographers, primarily black choreographers, have seen their work all over social media without their names attached.²⁶² As a result, one choreographer, JaQuel Knight, is working to provide them with the credit they deserve.²⁶³ Knight was facing a similar lack of accreditation, but not on TikTok.²⁶⁴ He created Beyoncé’s “Single Ladies (Put a Ring on It)” dance and “dances for J-Lo and Shakira’s 2020 Super Bowl halftime show and Cardi B’s ‘WAP.’”²⁶⁵ However, “he [does not] own the rights to most of his work,” partly due to the failures of copyright law for dance.²⁶⁶ Knight told Vice:

Single Ladies’ we’ve seen in feature films, we’ve seen on multiple TV shows. It has toured the world multiple times. Many people have made lots of money off of doing the choreography. And through all of that, I’ve made nothing.²⁶⁷

Knight decided to work to change the industry standards.²⁶⁸ In 2020, he became “the first commercial choreographer in pop music” to

²⁵⁹ Karennia Meredith, *TikTok Dancer Reacts to Addison Rae Using Her Work: “That Should’ve Been My Time,”* POPSUGAR (Mar. 30, 2021), <https://www.popsugar.com/entertainment/tiktok-mya-johnson-addison-rae-tonight-show-interview-48245258> (“But as Johnson thought about it more, the video didn’t sit right with her.”).

²⁶⁰ See Smith, *supra* note 256.

²⁶¹ Lea Zora Scruggs & Arlissa Norman, *Black TikTokers Are Tired of Not Getting Paid for the Moves You Stole*, VICE (Dec. 1, 2021, 9:38 AM), <https://www.vice.com/en/article/g5qqkw/black-tik-tok-tired-of-stolen-dances>.

²⁶² See *id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See Scruggs & Norman, *supra* note 261.

²⁶⁸ *Id.*; see also Steven Vargas, *Choreographer JaQuel Knight, Logitech Partner to Help BIPOC Dance Creators Copyright Their Moves*, USA TODAY,

copyright his work.²⁶⁹ He was able to accomplish this “[t]hrough a partnership with the Dance Notation Bureau,” which assisted him in putting his work into Labanotation.²⁷⁰ Now, through Knight Choreography and Music Publishing, Inc., he is helping other choreographers copyright their choreography as well.²⁷¹ He told *Variety*:

Copyrighting movement is about putting the power back in the artist’s hands . . . We set a historic precedent with our ‘Single Ladies’ copyright achievement, and we are thrilled to be launching Knight Choreography & Music Publishing, Inc. so that the next generation of artists are afforded the same platform, resources and tools to thrive, creatively and financially, in the commercial music industry.²⁷²

The six artists who are in the process of obtaining their privatization include: Keara Wilson, the creator of the “Savage” dance; Young Deji, the creator of “The Woah” dance; Fullout Cortland, creator of Doja Cat’s “Say So” performance at the 2020 Billboard Music Awards; the Nae Nae Twins, the creators of the “Savage Remix” dance; Chloe Arnold, the creator of “Salute A Legend” for Syncopated Ladies; and Mya Johnson and Chris Cotter, the creators of the “Up” dance.²⁷³

Knight is working with a lobbying firm to begin a “copyright movement.”²⁷⁴ Additionally, he partnered with Logitech to assist choreographers in getting their work registered.²⁷⁵ Although Knight’s work is beneficial and necessary to help change the industry’s standards,

<https://www.usatoday.com/story/tech/2021/08/03/jaquel-knight-and-logitech-help-bipoc-dance-creators-copyright-dances/5464726001/> (Aug. 3, 2021, 7:09 PM).

²⁶⁹ Steven Vargas, *What Copyright Protections Do Choreographers Have Over Their Work?*, DANCE MAG. (Jan. 25, 2021), <https://www.dancemagazine.com/choreography-copyright/>.

²⁷⁰ *Id.*

²⁷¹ Vargas, *supra* note 268; see also Scruggs & Norman, *supra* note 261.

²⁷² Jazz Tangcay, *Beyonce and Megan Thee Stallion Choreographer JaQuel Knight Launches Company to Copyright Dance Moves*, VARIETY (Apr. 22, 2021, 9:05 AM), <https://variety.com/2021/artisans/news/beyonce-choreographer-jaquel-knight-copyright-dance-moves-1234957578/>.

²⁷³ Vargas, *supra* note 268.

²⁷⁴ Scruggs & Norman, *supra* note 261.

²⁷⁵ *Id.*

there are still many obstacles in the way of choreographers gaining copyright protection, especially on TikTok where it is difficult to keep track of original choreographers of dance challenges.²⁷⁶ Knight told Forbes, “social media has taken advantage of choreographers in the sense that we have to fight for our rights, our own creativity, and our own work while it is being recreated and imitated at a rate that we often can’t keep up with.”²⁷⁷

As more choreographers on platforms such as TikTok realize they may have the ability to obtain copyright protection and financially gain from their work, it is time to inquire whether the law can be molded to better fit such creations.²⁷⁸ One dilemma lies in TikTok’s setup.²⁷⁹ The feed is not chronological, timestamps are not included, and hashtags are sorted by popularity rather than time.²⁸⁰ Creators of these dances are often hard to track, due to the rapid rate at which creators post and repost the challenges and subsequent lack of accreditation.²⁸¹ Thus, even if a recreator desired to afford credit to the original creator, they may have trouble determining who that user is.²⁸²

Another issue is the platform’s contractual agreement.²⁸³ Users of the app, like users of many other social media sites, subject themselves to a “browsewrap” agreement whereby they agree to the terms of the contract simply by using the app.²⁸⁴ The terms of service recognize copyright ownership when a video is uploaded to the platform; moreover, it also provides the following:

You or the owner of your User Content still own the copyright in User Content sent to us, but by submitting User Content via the Services, you hereby grant us an

²⁷⁶ See Tait, *supra* note 236.

²⁷⁷ Yola Robert, *JaQuel Knight Is Paving The Way For The Future Of Copyrighting Dance*, FORBES (Nov. 23, 2020, 1:33 PM), <https://www.forbes.com/sites/yolarobert1/2020/11/23/jaquel-knight-is-paving-the-way-for-the-future-of-copyrighting-dance/>.

²⁷⁸ See Vasbinder, *supra* note 45.

²⁷⁹ See *id.*

²⁸⁰ *Id.*

²⁸¹ See Johnson, *supra* note 135, at 1227.

²⁸² See Tait, *supra* note 236.

²⁸³ See Johnson, *supra* note 135, at 1236.

²⁸⁴ *Id.*

unconditional irrevocable, non-exclusive, royalty-free, fully transferable, perpetual worldwide licence to use, modify, adapt, reproduce, make derivative works of, publish and/or transmit, and/or distribute . . . User Content in any format and on any platform, either now known or hereinafter invented.²⁸⁵

Essentially, this clause negates the intellectual property rights afforded to the creator.²⁸⁶ Unfortunately, most TikTok users are not professionals—in fact many are children—they are less likely to read, much less understand, this browse-wrap agreement and will later find themselves in a predicament when they attempt to protect and profit from their work.²⁸⁷

Finally, all the issues discussed above—which exist in the protection of performance choreography—also exist for online and social media choreography.²⁸⁸ First, many of these dances are short, performed and reposted by the public, and do not contain the complexities that choreographic pieces like ballets do.²⁸⁹ Therefore, many courts will likely find that they fit into the social dance step category rather than the choreographic category. Second, because it is almost impossible to determine the original creator of a video, it is possible that dancers will file claims for dances even if they are not the original choreographers.²⁹⁰ The only element that is better tailored to social media choreography over performance choreography is the third: fixation.²⁹¹ Since these creations are all recorded through the application’s technology, the fixation element will always be satisfied.²⁹² Regardless, a host of issues arise when social media choreographers attempt to earn copyrights and, with a growing

²⁸⁵ *Terms of Service*, TIKTOK (Feb 2021), <https://www.tiktok.com/legal/page/row/terms-of-service/en>.

²⁸⁶ *Id.*

²⁸⁷ See Tait, *supra* note 236.

²⁸⁸ Vasbinder, *supra* note 45.

²⁸⁹ Siobhan Burke, *Some Pros Let It Go On TikTok: ‘Is This the Future?’*, THE NY TIMES (April 29, 2020), <https://www.nytimes.com/2020/04/29/arts/dance/tiktok-dance-challenges.html> (professional dancers who started dancing on TikTok describe how they can “let it go” on TikTok and not conform to the strictness and precision of professional dance).

²⁹⁰ See Tait, *supra* note 236.

²⁹¹ *Id.*

²⁹² *Id.*

number of users creating on apps like TikTok each day, it is time for the Copyright Office and the courts to reevaluate the copyright process for choreography.²⁹³

IV. ADDITIONAL REASONS WHY CHOREOGRAPHERS ARE NOT
SEEKING OR RECEIVING COPYRIGHT PROTECTION

A. *Barriers to Seeking Copyright Protection*

Besides the muddled law surrounding copyright for choreographic works, many choreographers do not seek protection for other reasons.²⁹⁴ The first reason is financial and affects pioneering choreographers more than large dance companies.²⁹⁵ Dancers and choreographers of smaller companies do not have high incomes; in fact, many are forced to seek additional forms of employment in addition to dance just to pay their bills.²⁹⁶ Yet, even if a company is well-known enough to gain a bigger audience, its earnings will be largely consumed by the cost of putting on a production as large as a ballet.²⁹⁷ For smaller dance companies, the cost of a production is in the low tens of thousands.²⁹⁸ For large companies, however, the price is well into high six figures.²⁹⁹ As a result, many

²⁹³ *Id.*

²⁹⁴ See Lopez de Quintana, *supra* note 82.

²⁹⁵ See *id.*

²⁹⁶ In this guide for dance majors at The University of Texas at Austin, it is noted that “dancers often supplement their income by working as guest artists with other dance companies, teaching dance, or taking jobs unrelated to the field.” *A Career Guide for Dance Majors*, THE UNIV. OF TEX. AT AUSTIN (Jan. 2005), <https://www.winthrop.edu/uploadedFiles/cvpa/THEATREDANCE/library/pdfs/documents-and-forms/danceguide.pdf>.

²⁹⁷ *What Does It Actually Cost to Produce a Dance Performance?*, DANCE MAG. (Nov. 8, 2020), <https://www.dancemagazine.com/cost-of-putting-on-a-dance-show/>. Dance Magazine worked with choreographer DeAnna Pellecchia of KAIROS Dance Theater to break down the costs of producing the company’s recent work, OBJECT. After paying the production expenses as well as the dancers, Pellecchia walked away with just \$1,000. The company made approximately \$5,000. The payout is even worse considering it took the company four years to create the project.

²⁹⁸ *Id.*

²⁹⁹ Singer, *supra* note 141, at 291.

choreographers simply do not have the funds to pursue a claim in the first place.³⁰⁰

Additionally, many choreographers have little faith the legal system will provide them with copyright protection if they were to seek it.³⁰¹ This is due to a couple reasons. First, judges often do not have the expertise necessary to determine which works deserve privatization.³⁰² Especially now, with claims ranging from choreographers of entire ballets in the same category as choreographers of thirty second videos on TikTok, there are too many factors that are simply out of a judge's sphere of knowledge.³⁰³ Second, in order to be "original," choreographers are constantly pushing the boundaries of what a dance piece looks like.³⁰⁴ With works becoming more abstract, it may be even more difficult for courts to determine whether a creation is a "choreographic work" or not.³⁰⁵ Thus, choreographers may just bypass the system and place trust in the community to respect and accredit each other's works.

Even when choreographers do obtain copyright protection, they often do not seek legal remedies.³⁰⁶ Rather, those within the industry rely on negotiation or peer pressure to settle their differences, rather than pursue enforcement.³⁰⁷ This is commonly successful simply because the dance community is small, so everyone knows each other and respects each other's work.³⁰⁸ This means infringement may not occur in the first place, but if it does, those in the industry will work together to right wrongs.³⁰⁹ Another reason choreographers may not seek justice through

³⁰⁰ *See id.*

³⁰¹ *See generally* Abitabile & Picerno, *supra* note 9.

³⁰² *Id.*

³⁰³ Riddhi Setty, *TikTok Dance Creators Struggle to Win Credit and Copyrights* (Aug. 16, 2022, 2:12 AM), <https://news.bloomberglaw.com/ip-law/tiktok-dance-creators-struggle-to-win-credit-and-copyrights>.

³⁰⁴ *See Choreographer*, *supra* note 1 ("The competition for originality is ever increasing in the dance world and choreographers strive to come up with an original idea and create it in a new and exciting way to attract audiences.")

³⁰⁵ *See Anduiza*, *supra* note 82, at 156.

³⁰⁶ Shant Sadtler, *Preservation and Protection in Dance Licensing: How Choreographers Use Contract to Fill in the Gaps of Copyright and Custom*, COLUM. J. OF L. & THE ARTS (July 3, 2012), <https://doi.org/10.7916/jla.v35i2.2176>.

³⁰⁷ Lopez de Quintana, *supra* note 82, at 168.

³⁰⁸ *Id.* at 161.

³⁰⁹ *Id.* at 164.

the judicial system is due to the high costs of suing.³¹⁰ Struggling choreographers usually will not have the funds to pay for lengthy litigation.³¹¹

Further, even though the Copyright Office has legally included choreography as copyrightable material, it still does not have a solid handle on how to reward such privatization.³¹² Robert Kasunic, the U.S. Copyright Office's associate register of copyright and director of registration policy and practice, told *Forbes* that the Copyright Office does not even have a separate label for choreographic works.³¹³ Rather, it includes them with "dramatic works" of which there are hundreds of thousands.³¹⁴ Thus, choreographic works often get lost.³¹⁵ He said, "Choreography still feels a bit like the Wild West of copyright."³¹⁶

B. *Proving Infringement*

If a choreographer has successfully gained copyright protection, they may have yet another hurdle to jeté over that presents its own difficulty: proving an infringement.³¹⁷ Under the Copyright Act, a choreographer must prove substantial similarity, which the Supreme Court has not articulated for choreographic works.³¹⁸ In *Horgan*, the court applied the test set out in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*: 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."³¹⁹ Additionally, *Horgan* said, "Even a small amount of the original, if it is qualitatively significant, may be sufficient to be an infringement, although the full original could not be recreated from the excerpt."³²⁰

³¹⁰ Singer, *supra* note 141, at 296.

³¹¹ *Id.*

³¹² See Robert, *supra* note 277.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Lopez de Quintana, *supra* note 82, at 164.

³¹⁹ *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986).

³²⁰ *Id.*

The ordinary observer standard is troublesome because an ordinary observer will have a very different understanding of choreography than a professional.³²¹ Additionally, an aesthetic appeal is overbroad.³²² An ordinary observer might take into consideration lighting, costumes, or set design, which may or may not be like another piece.³²³ However, those things are separate from the choreography itself thus should not be included in the analysis. Lastly, because the human body can only create so many movements, it is nearly impossible for a new piece not to include steps from another piece.³²⁴ Dancers learn and perfect a certain set of steps for each piece—for instance a pirouette, jazz walk, or stag leap—so most pieces will include many of the same steps.³²⁵ The originality of choreography exists in the way a creator strings all these movements together, not necessarily in the way they invent completely new steps.³²⁶ Therefore, the tests set forward for analyzing whether infringement has occurred do not fit the realities of dance choreography, making infringement very difficult for a choreographer to prove.³²⁷

V. CONCLUSION

It is no wonder that performance choreographers and social media choreographers alike are seeking copyright protection.³²⁸ A copyright holder is rewarded with legal protection that provides exclusive rights to a creation and credit for work.³²⁹ However, copyright law has not made it easy for choreographers to gain these rights.³³⁰ In order to solve the issues presented, it is necessary to both alter copyright law as it relates to dance, and influence choreographers to educate themselves on the process.

First, the originality requirement must provide more guidance for courts. As most judges are presumably not choreographers or dancers, it is likely more difficult for them to analyze whether a piece is in fact

³²¹ Lopez de Quintana, *supra* note 82, at 166.

³²² *Id.*

³²³ *Id.* at 167.

³²⁴ See Van Camp, *supra* note 18, at 68.

³²⁵ *Id.*

³²⁶ *Id.* at 74 (citing Horgan v. MacMillan that said choreography “is the flow of steps” in the dance).

³²⁷ *Id.* at 71.

³²⁸ See generally Johnson, *supra* note 135.

³²⁹ Arcomano, *supra* note 51.

³³⁰ See Van Camp, *supra* note 18.

original.³³¹ The other copyright subject matters' originality is easier to decipher.³³² For instance, does an author create a book composed of a storyline and composition that is all his or her own? If so, their work is likely original. The words in the sentence would not be considered, because, obviously, every author has only a certain number of words in a language to create their sentences.³³³ Similarly, choreographers must use a language, consisting of a certain number of dance steps, to create a piece.³³⁴ Therefore, a piece should be considered in its totality, not by the components which form it.³³⁵ Possibly, the law could include language that a piece's originality should be considered by focusing not on the individual movements but on how they are strung together and placed on the dancers.³³⁶ If that string of movement in its totality is unlike another piece of work, it is more likely to be original.³³⁷ Overall, thorough guidance on this issue is necessary to assist courts in assessing the originality of a piece.³³⁸

Second, the line between choreographic works and social steps must be clarified.³³⁹ Choreographers must have a better sense of what is asked of them to create a piece that is copyrightable.³⁴⁰ The law must include elements or factors for a court to consider, such as the length of a piece, the accessibility of the piece to the public, and the complexity of the piece.³⁴¹ If an agreement is made that online choreography on platforms like TikTok should be included, the requirements should be looser because a TikTok routine is shorter, accessible to the public, and less complex.³⁴² This would allow for TikTok creators to protect their work from companies like Epic Games and promote creativity in the dance world.³⁴³ If it is agreed that copyright should be reserved for professional dance

³³¹ See Johnson, *supra* note 135, at 1248.

³³² *Id.*

³³³ See Van Camp, *supra* note 18, at 63–64.

³³⁴ See Saucier, *supra* note 22.

³³⁵ See Van Camp, *supra* note 18, at 62–66.

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ See Lopez de Quintana, *supra* note 82, at 155–57.

³³⁹ See Johnson, *supra* note 135, at 1262–63.

³⁴⁰ *Id.* at 1244.

³⁴¹ *Id.* at 1263.

³⁴² *Id.* at 1262.

³⁴³ See generally *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 621–23 (D. Md. 2020).

choreography, the requirements should be tighter. This would mean a less flooded system and that copyright claims would be prestigious and coveted.

The fixation requirement must also be altered. Many choreographers abstain from seeking protection due to this requirement alone, simply because of the time and financial hurdles involved.³⁴⁴ The Copyright Office should consider that dance is unlike other copyright subject matters and that memorialization occurs differently.³⁴⁵ Through the centuries, dance has been remembered through word of mouth or illustrations and the main form of expression is through performances.³⁴⁶ To ask choreographers to change this process in order to protect their own rights is unfair. This element is tricky to completely eliminate, because a court must have some way of comparing various pieces.³⁴⁷ Labanotation is expensive and seldom used in the dance world.³⁴⁸ Therefore, less emphasis should be put on this form of memorialization.³⁴⁹ The most convenient and least expensive option is video recording.³⁵⁰ However, since the two-dimensional aspect of video recordings does not accurately reflect a piece of choreography's complexities,³⁵¹ the law should not place as much significance in this element. Rather, courts should be able to consider more heavily the testimony of experts in the field, rather than the video recording, to provide an analysis of the piece.³⁵²

Due to the plethora of hardships inherent in how copyright applies to choreography, some have suggested an entirely new approach: choreography should be treated similarly to music composition.³⁵³ If a piece of music has a music synchronization license, the holder of that license must grant permission for anyone to use their piece, whether it is

³⁴⁴ Evie Whiting, *Square Dance: Fitting the Square Peg of Fixation into the Round Hole of Choreographic Works*, 65 VAND. L. REV. 1261 (2019), <https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1347&context=vlr>.

³⁴⁵ See Johnson, *supra* note 135, at 1252.

³⁴⁶ The Art of Dance; *Choreography, Movements & History*, ART (last visited Sept. 1, 2022), <https://art.art/blog/the-art-of-dance>.

³⁴⁷ See Van Camp, *supra* note 18.

³⁴⁸ See Van Camp, *supra* note 18, at 77, 83.

³⁴⁹ *Id.* at 77.

³⁵⁰ See Lopez de Quintana, *supra* note 82, at 159.

³⁵¹ *Id.*

³⁵² See Van Camp, *supra* note 18, at 77.

³⁵³ See Lopez de Quintana, *supra* note 82, at 156.

in a film, a video game, or anything else.³⁵⁴ Courts look to the way rhythm, harmony, and melody are combined.³⁵⁵ It seems this would be beneficial for choreography as well.³⁵⁶ If a choreographer holds a similar license, they will have the ability to decide who uses their work and grant permission to those who they approve of.³⁵⁷ In analyzing choreography, the combination of rhythm, space, and movement may help determine whether the creator has truly left their individual stamp, and thus deserves the tag “original.”³⁵⁸ However, this would be a very different approach to the way courts have handled choreography copyright and may be too tough an ask.³⁵⁹

It is more important now than ever to afford an easier and clearer process for choreographers because there are more creators than ever.³⁶⁰ For example, the industry “has grown 1.9 percent per year from 2018 to 2023 and is expected to increase 7.6 percent in 2023.”³⁶¹ Additionally, there is a plethora of independent dancers all over social media choreographing dances each day.³⁶² Not only does copyright law need to evolve to protect more creators, but it must distinguish between creators putting the time and effort in to earn privatization from the creators who copy the work of others while claiming it as their own.³⁶³

It is a great step that choreography is now included as a work eligible for protection under copyright law.³⁶⁴ However, copyright law as it stands is not suited for dance, demonstrated by the many challenges courts face when evaluating choreographic copyright claims.³⁶⁵ From

³⁵⁴ Vargas, *supra* note 269.

³⁵⁵ See Lopez de Quintana, *supra* note 82, at 156.

³⁵⁶ See Singer, *supra* note 141, at 300–01.

³⁵⁷ *Id.* at 294–95.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ See Ceci, *supra* note 231 (showing a 45% increase in TikTok users from 689 million users in 2020 to 1 billion users in 2021).

³⁶¹ *Exploring Dance Industry Statistics 2023: Latest Trends and Insights*, GITNEX (March 28, 2023), <https://blog.gitnux.com/dance-industry-statistics/#:~:text=The%20Dance%20Studios%20industry%20in,to%20increase%207.6%25%20in%202023>.

³⁶² See generally Johnson, *supra* note 135.

³⁶³ *Id.* at 1274.

³⁶⁴ See Van Camp, *supra* note 18.

³⁶⁵ See Abitabile & Picerno, *supra* note 9, at 40, 55.

professional choreographers to passionate kids on TikTok, no one feels that copyright law is doing dance justice.³⁶⁶ For this reason, it is time for courts to create protection suitable to choreography by either solidifying current dance copyright standards or reimagining the law completely.³⁶⁷ Either way, it is imperative changes be made. Art is not nearly as appreciated as it should be, especially for how prevalent and treasured it is by society.³⁶⁸ Creativity must be promoted and protected in a much more significant way than it is today. These changes can begin with copyright law.

³⁶⁶ See generally Johnson, *supra* note 135; Vasbinder, *supra* note 45.

³⁶⁷ See Abitabile & Picerno, *supra* note 9, at 40, 55.

³⁶⁸ See Whiting, *supra* note 344, at 1278.