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Cover Page Footnote

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Finding the Barre: Fitting the Untried Territory of Choreography Claims into Existing Copyright Law

Kara Krakower*

The American dance scene has been growing, both in popularity and profitability, since its inception in the early 1900s. After fighting for decades for Congress to include it in Copyright laws, the dance community saw "choreographic works" added as a protected medium in the Copyright Act of 1976. The Copyright Act does not define choreography, something this Note seeks to do. Since its enactment, very few choreographers have brought claims under the statute. This Note seeks to evaluate the standards that would apply in a potential choreography copyright infringement suit by following two hypotheticals through the determination and application of copyright law. This Note posits a possible rationale for choreography's addition to the 1976 Copyright Act. After determining what standards from general copyright law would be applicable to a choreography copyright infringement suit, this Note suggests clarifications to the statute, specifically by presenting a definition of choreography itself and clarifying the use of fair use factors in a defense analysis. This Note concludes with the application of the suggested standards to two hypotheticals: a hypothetical claim by a modern choreographer against Beyoncé for using her choreography in a music video, and

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a hypothetical claim by Martha Graham against her protégé Paul Taylor for appropriating her signature technique.

INTRODUCTION

Imagine you are an ambitious choreographer who has worked your whole life to develop a distinct performance style and make your mark on the artistic dance scene. You started your own company and you taught young dancers your signature moves. Further imagine the horror of arriving at a new venue, or in a different city, only to see that a former dance student has stolen your choreography. The former student has given you no attribution, no mention of you or your company at all. You decide to hire a lawyer and sue your former dancer/student. Fortunately for you, you live in a time when you may have a valid claim.[1] Unfortunately, it was not until Congress passed the Copyright Act of 1976 ("Copyright Act") that legal recourse became available to you[2] in this hypothetical position. So how can you use the Copyright Act to your advantage? This Note explores the development of copyright protection for choreography and examines whether the hypothetical choreographer has a legal avenue to assert his or her rights.

The origin of the Copyright Act as a statue protecting literary works has created challenges for its application to choreography.[3] The language and concepts do not easily lend themselves to other mediums, including choreography. This difficulty is seen in the

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1 *See* 17 U.S.C. § 102(a)(4) (2012).

2 *See infra* Section I.A.

3 *Cf.* BETHANY KLEIN ET AL., UNDERSTANDING COPYRIGHT: INTELLECTUAL PROPERTY IN THE DIGITAL AGE 10–20 (2015).

claims brought by dance choreographers[4] prior to the inclusion of choreographic works in the Copyright Act of 1976.[5] Choreographers have attempted to use copyright law since the late 1800s to protect their work, with mixed success.[6] Since the Copyright Act's enactment, which included protection for choreography, few choreographers have asserted this hard-won legal right.[7] Many choreographers seem to pass on taking legal action when faced with the daunting task of understanding how to make a claim, and then navigating through entrenched copyright law defenses.[8] This Note seeks to evaluate the scope of protection for choreography under the Copyright Act using two relatively modern cases. The first, a controversial incident involving Beyoncé and Anna Teresa De Keersmaeker, is a recent example of fairly obvious copying.[9] However, whether the copying constitutes copyright infringement is a more complicated question. The second, a comparison of Paul Taylor and Martha Graham's signature dance styles, demonstrates the outer edges of what a court might consider copying, and explores whether Taylor's style is similar enough to Graham's that it constitutes copyright infringement.[10] Looking at the legal and legislative histories of the 1976 amendments to the Copyright Act, this Note establishes a test that potential claimants can follow, and recommends to the judicial system how it could interpret the Copyright Act to better apply to the amorphous choreographic arts.

Part I of this Note details the history of American dance and provides two factual hypotheticals to ground the discussion. Part II

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4 *Choreographer*, OXFORD ENG. LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/choreographer [https://perma.cc/SYH9-5P2X] (last visited Jan. 27, 2018) ("A person who composes the sequence of steps and moves for a performance of dance."). This is comparable to music where there is a difference between composing and improvising. *See id.* This Note assumes performed dances are choreographed by a choreographer.

5 *See infra* Section I.A.1 and accompanying text.

6 *See infra* notes 58–71 and accompanying text.

7 *See* ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE 284–85 (2016).

8 *See* Mary Ellen Hunt, *Copying Choreography*, DANCE TCHR., Oct. 2014, at 110, 112.

9 *See infra* Section I.B.

10 *See infra* Section I.C.

determines what standards in general copyright law would be applicable in a choreography suit, particularly by providing a definition of choreography itself and clarifying the use of fair use factors in a defense analysis. Part III reveals flaws in the current statute, suggests modifications Congress and the judiciary can make as more choreography infringement suits are brought in the future, and applies such suggestions to hypothetical claims to further understand their use.

I. THE BASICS OF DANCE HISTORY AND HYPOTHETICAL CHOREOGRAPHY COPYRIGHT INFRINGEMENT CLAIMS

Before exploring the development of copyright law for choreography, it is necessary to understand the basic history of dance and choreography. Some form of performance dance[11] has existed in organized cultures stretching as far back as the fourteenth century in Japan, and even further back to the sixth century B.C.E. in Greece.[12] Dance made for the proscenium stage[13]

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[11] Performance dance means dance meant to be performed for an audience, as opposed to social dancing or ritual dancing in which the audience participates in the dancing. *See* JACK ANDERSON, BALLET & MODERN DANCE: A CONCISE HISTORY 14–15 (2d ed. 1992).

[12] ANDERSON, *supra* note 11, at 15; *see also Introduction*, Subsection of *Women in Ancient Greek Drama Including Roles, Influences, Audiences, and Questions and Answers*, ROLE OF WOMEN ART ANCIENT GREECE, http://www.rwaag.org/gdrama [https://perma.cc/YF8T-J3YJ] (last visited Apr. 4, 2018); *Overview of Japanese Dance*, JAPANESE DANCE, http://web-japan.org/museum/dance/about_da.html [https://perma.cc/55F7-K53J] (last visited Apr. 4, 2018). In Japan, Noh and Kabuki Theater was performed. *Overview of Japanese Dance*, *supra*. Ancient Greek civilizations, especially in Athens, had theater and dance performances in their amphitheaters, an early precursor to the stage we know today. *See Women in Ancient Greek Drama*, *supra*.

[13] A proscenium stage is a structure with a defined front, usually achieved by building a stage surrounded by three walls instead of four, where the area for the fourth wall opens to the audience like a picture frame. *See Stage Types – Proscenium Arch*, WORD PRESS: THEATRE DESIGN, https://theatredesigner.wordpress.com/theatre-design-101/stage-types-proscenium-arch/ [https://perma.cc/6KJ2-NLJL] (last visited Apr. 14, 2018). Well known examples include the Koch Theater or the Metropolitan Opera Theater where the only possible view of the work being performed is from the front. *See* DAVID H. KOCH THEATER, SEATING CHART, https://davidhkochtheater.com/DHKT/media/DHKT/FPO/DHKT-FullChart.pdf [https://perma.cc/58WK-CAF8] (last visited Apr. 14, 2018); *David H. Koch Theater*, N.Y. CITY BALLET, https://www.nycballet.com/About/David-H-Koch-Theater.aspx [https://perma.cc/49AF-8LKT] (last visited Apr. 14, 2018); Daniel J. Wakin, *Verdi with Popcorn, and Trepidation*, N.Y. TIMES (Feb. 13, 2009), https://www.nytimes.com/2009/02/15/arts/music/15waki.html. Proscenium stages are

traces its roots back to the French court ballets of the sixteenth century.[14] As a result of various methods of both movement and performance, choreography has always been a somewhat amorphous art form, both inspiring and confounding spectators throughout history.[15] While dance and choreography have existed for centuries, their preservation has always been a challenge. Typically, "dances are preserved—if preserved at all—only in the memory of the artists who perform them."[16] Since memories are impossible to record, dances present unique legal challenges.[17]

In 1976, "choreographic works" was added to the Copyright Act.[18] Protecting this art form was a massive shift in choreography's place within American law.[19] Other forms of art, such as music, were protected long before protecting choreography was ever even considered.[20] Music developed at an earlier point in American history, with the founding of the New York Philharmonic in 1842.[21] American dance companies[22] did not

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used for the most prestigious and the most traditional forms of dance. *Cf.* ANDERSON, *supra* note 11, at 51 (mentioning how "the proscenium theatre had replaced the galleried hall" concurrent "[w]ith the opening of the Paris Opéra").

14 *See* SUSAN AU, BALLET AND MODERN DANCE 11 (Jim Rutter ed., 3d ed. 2012).

15 *Cf.* ANDERSON, *supra* note 11, at 1.

16 *Id.*

17 Prior to the proliferation of recording devices—such as cameras and iPhones—and the development of codified dance notation forms, recording choreography was inaccurate, expensive, and confusing. *See generally infra* notes 106–18 and accompanying text (discussing origins of codified dance).

18 Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 632 (2d Cir. 2004) ("[C]horeography was not provided until the 1976 Act included 'choreographic works' among the categories of works eligible for protection." (quoting 17 U.S.C. § 102(a)(4) (1976))).

19 *See* Nicholas Arcomano, *The Copyright Law and Dance*, N.Y. TIMES (Jan. 11, 1981), http://www.nytimes.com/1981/01/11/arts/the-copyright-law-and-dance.html?pagewanted=all.

20 *See* U.S. COPYRIGHT OFFICE, CIRCULAR 1A, U.S. COPYRIGHT OFFICE: A BRIEF INTRODUCTION AND HISTORY, https://www.copyright.gov/circs/circ1a.html [https://perma.cc/BSM2-X2WC] (last visited Apr. 15, 2018) (noting under "Notable Dates in United States Copyright" that music was added to the Copyright Act in 1831).

21 *See Overview*, N.Y. PHILHARMONIC, https://nyphil.org/about-us/history/overview [https://perma.cc/357B-G9NW] (last visited Oct. 29, 2017). The other "Big Five" orchestras in the United States are similarly old. *See* Fred Kirshnit, *New York Drops Off the List of 'Big Five' Orchestras*, N.Y. SUN (Dec. 5, 2006), http://www.nysun.com/arts/new-york-drops-off-the-list-of-big-five-orchestras/44570/ [https://perma.cc/JU5M-URR8]; *see also* James R. Oestreich, *The Big Five Orchestras No Longer Add Up*, N.Y.

begin forming until the mid-1900s.[23] Throughout the history of dance there has been disagreement over whether it is high- or low-brow art.[24] Choreographers have long attempted to align themselves with other high-brow art forms, such as orchestras, as opposed to low-brow forms, such as vaudeville or burlesque, in an effort to seek legitimacy and respect.[25] Choreographers sought similar copyright law protection prior to the 1976 amendments with mixed results.[26] The legislative history and the parallel dance history leading up to the Copyright Act illuminate a confluence of events that elevated American dance to the status of American music, thus enticing the legislature to address it within copyright law.[27]

As this Note explores, a definition of choreography is challenging to come by.[28] As a starting reference, however, a basic

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TIMES (June 14, 2013), http://www.nytimes.com/2013/06/16/arts/music/the-big-five-orchestras-no-longer-add-up.html [https://perma.cc/8Q3M-D3LX]. The remainder are: (1) Boston Symphony Orchestra, founded 1881, *see The History of the BSO*, BOS. SYMPHONY ORCHESTRA, http://www.bso.org/brands/bso/about-us/historyarchives/the-history-of-the-bso.aspx [https://perma.cc/BJ7Y-H57W] (last visited Oct. 29 2017), (2) Chicago Symphony Orchestra, founded 1891, *see Meet the Performers: The Chicago Symphony Orchestra*, CHI. SYMPHONY ORCHESTRA, https://cso.org/about/performers/chicago-symphony-orchestra/chicago-symphony-orchestra1/ [https://perma.cc/AS2U-E4E2] (last visited Oct. 29 2017), (3) Philadelphia Orchestra, founded 1900, *see Overview*, Section of *About*, PHILA. SYMPHONY ORCHESTRA, https://www.philorch.org/about#/ [https://perma.cc/8JQG-J2N3] (last visited Apr. 15, 2018); *see also History*, Section of *About*, PHILA. SYMPHONY ORCHESTRA, https://www.philorch.org/history#/ [https://perma.cc/4CA2-XULM] (last visited Apr. 15, 2018), and (4) Cleveland Orchestra, *see Mission and History*, Section of *About the Orchestra*, CLEVELAND ORCHESTRA, https://www.clevelandorchestra.com/about/mission-and-history/ [https://perma.cc/UJY5-PQMR] (last visited Apr. 15, 2018).

[22] *Definition of 'Dance Company'*, COLLINS ENG. DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/dance-company [https://perma.cc/545P-S8ZW] (last visited Mar. 3, 2018) ("[A] group of dancers, usually including business and technical personnel.").

[23] *See infra* notes 76–88 and accompanying text.

[24] *See* KRAUT, *supra* note 7, at 168–69. High-brow art is the type of performance high society would attend, such as an opera or symphony, characterized as intellectual and classy. *See id.* Low-brow art is the type presented in vaudeville shows, characterized as lewd, crass, and primitive. *See id.*

[25] *See id*.

[26] *Cf. id.* at 282–84 (showing a timeline of intellectual property rights granted related to dance).

[27] *See infra* Section I.A.

[28] *See infra* Section II.B.

definition may be helpful. According to the Oxford English Dictionary, choreography is, "the written notation of dancing," and "the art of dancing."[29] The word traces its etymology from the Greek words for dancing and writing, displaying the long tradition significantly pre-dating the Copyright Act.[30] This Note discusses more fully how such a bare-bones definition is too ambiguous when faced with the history of choreography cases and modern sensibilities regarding choreography.[31] The Copyright Act does not define choreography, and courts have pulled from a variety of sources to find a workable legal definition, as discussed in Section II.B.[32] Legal history suggests that choreography must contain some plot or narrative, while modern dance challenges such a notion.[33]

Choreography has developed along with more traditional dance styles, a trajectory on which this Note mainly focuses. Choreography, dance, and the law have historically had a tenuous relationship.[34] As discussed in Section I.A, including choreography in the Copyright Act marked the confluence of shifting opinions about choreography.[35] The establishment of dance and choreography as an art form, rather than a form of vulgar entertainment, greatly influenced the reasoning behind including choreography protection in the Copyright Act.[36] As some works suggest, the whiteness and maleness of choreography in the mid-1900s played a large role in the legitimization of choreography and its shift towards being acknowledged as "high-brow" art.[37] The reputational transition of dancers from prostitutes to artistic geniuses parallels the rise in prominent male dancers and choreographers.[38] Additionally, the movement between classes of

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[29] *Choreography*, OXFORD ENG. DICTIONARY ONLINE, www.oed.com/view/Entry/32319 (last visited Sept. 16, 2017).

[30] *Id.*

[31] *See infra* Section II.B.

[32] *See infra* Section II.B.

[33] *See infra* notes 97–105, 172–93, and accompanying text.

[34] *See infra* Section I.A.

[35] *See infra* Section I.A.

[36] *See infra* Section I.A.

[37] *See generally* KRAUT, *supra* note 7, at 168–69 (discussing the impact of race on dance intellectual property rights); CAROLINE JOAN S. PICART, CRITICAL RACE THEORY AND COPYRIGHT IN AMERICAN DANCE: WHITENESS AS STATUS PROPERTY (2013) (same).

[38] *See generally* KRAUT, *supra* note 7, at 168–69; PICART, *supra* note 37.

people, inextricably tied to both gender and race, is an undercurrent to this Note.[39] While not this Note's focus, it is important to keep these undertones in mind to understand the lack of litigation and recent addition of choreography to protected copyright classes.[40]

In the early 1900s the notation of choreography became an important preoccupation of notable modern choreographers.[41] At the same time film was becoming more accessible and useful in the 1920s.[42] These advancements paved the way for a new era in choreography, since now choreography no longer only existed "in the memory of the artists who perform them."[43]

Despite being more easily recorded and statutorily protected against infringement, a potential choreography copyright infringement claimant faces huge barriers because precedent does not clearly define choreography or provide a coherent standard for liability. To begin evaluating the standard, Part II discusses the inquiry for liability under the Copyright Act.

The liability inquiry includes determining whether direct copying or substantially similar copying occurred.[44] Following an investigation of copying, the inquiry continues to consider fair use

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[39] *See generally* KRAUT, *supra* note 7, at 168–69; PICART, *supra* note 37; *infra* Section I.A.

[40] Some scholars posit that the crucial factor that pushed dance choreography into legitimacy and into the Copyright Act is its internal development into predominately white and male power brokers within the field. *See generally* KRAUT, *supra* note 7, at 168–69; PICART, *supra* note 37. The distancing from vaudeville and "colored" forms of choreography and the embrace of whiteness within choreography made choreography and dance more legitimate and "high-brow," but also brought concepts like ownership and copyright into the choreographer's vernacular. *See* KRAUT, *supra* note 7, at 168–69.

[41] *See* discussion *infra* Section I.A.

[42] For a brief overview on the history of film, see Robert Sklar & David A. Cook, *History of the Motion Picture*, ENCYCLOPEDIA BRITANNICA (Mar. 22, 2018), https://www.britannica.com/art/history-of-the-motion-picture [https://perma.cc/D7QY-29Y3].

[43] *See* ANDERSON, *supra* note 11, at 1. As discussed *infra* Section I.A.3, dance notation is the writing down of dance choreography in such a way that someone can read it and recreate the dance later, even without seeing it performed before.

[44] *See infra* Section II.C.1–2.

factors.[45] To date, no choreography copyright precedent has continued beyond considering a definition of choreography.[46]

In order to understand what makes this Note's proposed suggestions useful and why the current standard is inadequate, it is necessary to understand the lead up to and addition of "choreographic works" to the Copyright Act.[47] Section I.A provides a background on how choreographers attempted to use copyright law to protect their work before choreography was explicitly protected. Additionally, Section I.A provides a brief history of the development of American dance leading up to the passage of the Copyright Act. To illustrate potential claims under the Copyright Act, this Note uses two relatively modern case studies. Section I.B describes the alleged copying of Anna Teresa De Keersmaeker by Beyoncé in her music video "Countdown." Section I.C details the potential infringement of Paul Taylor on Martha Graham's signature style of movement**.**

A. History of American Dance Preceding the Copyright Act of 1976

Prior to the addition of choreographic works to the Copyright Act of 1976, choreographers attempted to use copyright protections as choreography developed into more of an art.[48] Before delving into the issues presented by a modern claim under the Copyright Act, it is essential to understand the evolution of choreography's relationship with the law and the dance history preceding the introduction of choreographic works into the statute.

1. Choreographers' Reliance on Copyright Law Prior to 1976

One of the earliest recorded attempts by a choreographer to employ copyright law was in 1867.[49] In *Martinetti v. Maguire*, a production of *The Black Crook* in New York and a production of *The Black Rook* in California both claimed the other show

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45 *See infra* Section II.C.3.

46 *See infra* Section II.B.

47 *See supra* notes 18–27 and accompanying text; *see also* 17 U.S.C. § 102 (2012).

48 *See infra* Section I.A.1.

49 *See* KRAUT, *supra* note 7, at 281; *see also* Martinetti v. Maguire, 16 F. Cas. 920 (C.C.D. Cal. 1867) (No. 9,173). The Plaintiff sued under the Copyright Act of 1870 for a dramatic composition for copyright infringement. *See Martinetti*, 16 F. Cas. at 920.

infringed its copyright.[50] Using the language of the Copyright Act of 1870, the parties in *Martinetti* requested an injunction against the competing performance, arguing that the works were "dramatic composition[s]" under the Act.[51] The court described "dramatic composition" to require a plot, something closer to a Shakespeare play.[52] The court stressed that *The Black Crook* "dialogue [was] . . . scant and meaningless" and an "exhibition of women in novel dress or no dress."[53] Despite being incredibly popular and profitable,[54] *The Black Crook* was considered lewd. The shows were deemed mere "spectacle," and thus not worthy of protection as a "dramatic composition," regardless of which one was the original.[55] The court opined that, even if considered a "dramatic composition," a work "which is grossly indecent, and calculated to corrupt the morals of the people" did not promote any constitutional sense of science or art.[56]

This early attempt demonstrates a key pattern in the use of copyright as it applies to choreography: only where choreography is seen as high-brow is it given the protection of the law.[57]

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[50] *See Martinetti*, 16 F. Cas. at 922–23 (determining the shows are basically identical, but not protected by the Copyright Act as neither is a "dramatic work").

[51] *See id.* at 920–23.

[52] *See id.* Indeed, the court is insulted that someone would presume to include this "spectacle" in the same category as an "English drama." *Id.*

[53] *Id*.

[54] *See Broadway's First Musical: The Black Crook*, BOWERY BOYS: N.Y.C. HIST. (Nov. 26, 2007), http://www.boweryboyshistory.com/2007/11/broadways-first-musical-black-crook.html [https://perma.cc/2NP6-DCZD] ("[I]t was a huge success, running 263 performances and, in a proud American tradition, spawning a sequel, *The White Fawn*."). The court did not find its popularity to have any bearing on its status as a copyrightable work. *See Martinetti*, 16 F. Cas. at 922 (citing U.S. CONST. art. I, § 8, cl. 8).

[55] *Martinetti*, 16 F. Cas. at 922. The court did not find spectacle to fall under the ordinary meaning of the Copyright Act or the larger constitutional grounding for the statute. *See id.* The court was not persuaded that *The Black Crook* or *The Black Rook* were "dramatic compositions," nor was it persuaded that they provided any virtues in service of the constitutional rational of "promot[ing] the progress of science or useful arts." *Id.* at 923.

[56] *Id.* at 922.

[57] As discussed later in this Note, choreography can be more closely associated with low-brow entertainment, calling to mind the association between dancer and sex worker, or it can be more closely associated with high-brow entertainment, categorizing a dancer as an artist. *See supra* notes 34–40 and accompanying text. This dichotomy can be seen in the ways choreography and dance are spoken about in different time periods and in different publications. *See infra* discussion in Section I.A.2. There are other factors at

A notable attempt to use copyright protection to a choreographer's advantage was Loie Fuller ("Fuller") when she sued her former dancer in *Fuller v. Bemis*.[58] Fuller was an early American modern choreographer prominent in the budding modern dance[59] community in the 1890s, who played with lighting and costumes to evoke new and interesting movements.[60] Fuller's *Serpentine Dance*, first performed in 1892, used billowing silk costumes and lighting to create a unique visual experience for the viewer long before animation or computer-generated images.[61] In it, a dancer created waves with the lightweight fabric under the changing lights.[62] In 1892, Fuller sued her former dancer for performing *Serpentine Dance* on her own without compensating

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work in this issue, including race and gender, that make associations to one or the other stronger. *See, e.g.*, KRAUT, *supra* note 7, at 168–69. This was seen when Loie Fuller was denied copyright protection when most experimental forms of dance were viewed as exotic or sexual. *See infra* notes 58–65 and accompanying text. It was again apparent when Balanchine was hailed as a visionary while his contemporary Katherine Dunham, an African-American dancer and choreographer who developed what she saw as a hybrid of ballet and African dance, was not elevated to such a status. *See* PICART, *supra* note 37, at 96–102. While Dunham was seen as elegant and qualified, she was still considered an exotic curiosity compared to Balanchine and Graham. *See id.* There have been no tests in the legal sphere about her legacy, but her tenuous place within dance history itself makes it less certain she would so easily be categorized as a choreographer under the old standard of being useful for the development of the arts and sciences. *See generally id.* (discussing sentiments about her at the time). Considering how a choreographer with less privilege than those discussed more fully in this Note would fare in an infringement action demonstrates how thin the line between high- and low-brow art can be.

[58] 50 F. 926, 926–28 (C.C.S.D.N.Y. 1892), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541, 2544–45, *as recognized in* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 340–41 (S.D.N.Y. 2014).

[59] Modern dance is an amorphous and confusing term typically used to refer an "expressive style of dancing that developed in the early [twentieth] century as a reaction to classical ballet." *Modern Dance*, ENG. OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/modern_dance [https://perma.cc/5S4G-GH49] (last visited Feb. 17, 2018). As Jack Anderson points out in his book *Ballet & Modern Dance*, the term is hard to define because it denotes more of "an attitude toward dance" than a specific technique. ANDERSON, *supra* note 11, at 165. It is ever evolving and changing, regenerating as new choreographers enter the scene. *See id.* For the purposes of this Note, "modern dance" refers to the more grounded and less rigid styles of dance, like ballet, that modern dance reacts against.

[60] *See* KRAUT, *supra* note 7, at 56.

[61] *See id.* See also *Serpentine Dance (Paris, France 1896)*, YOUTUBE (Feb. 14, 2013), https://www.youtube.com/watch?v=8zkXb4aWVZs, for a video of the Serpentine Dance.

[62] *See Serpentine Dance (Paris, France 1896)*, *supra* note 61.

Fuller.[63] The court denied the copyright claim, finding that there was no "dramatic composition."[64] The court instead held Fuller's choreography was simply an idea under the Copyright Act of 1870 and consequently not granted copyright protection.[65]

Even though copyright protection was denied in both early cases, they both shed light on what may be worthy of copyright protection. The focus of the court in *Martinetti* on the musical's vulgarity and immorality precluded copyright protection, exposing the effect of the court's determination of whether the art is high- or low-brow in courts' analysis.[66] The court's classification of *Martinetti* as low-brow made it a natural progression to denying protection.[67] Similarly, in *Fuller v. Bemis*, the court's view of Fuller's work as entertainment by a "comely woman" simply moving "gracefully" was not enough to rise to the status of protection.[68] The combination of these two earlier cases taught the choreographer community a few key lessons. First, that a work must be a "dramatic composition," in effect closer to a play or musical than abstract movement without a plot as the court in *Fuller* described.[69] Secondly, that the choreography must convey a more concrete idea than billowing silk.[70] In the wake of *Fuller v. Bemis*, many choreographers continued bringing copyright

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63 *Fuller*, 50 F. at 926–28. Fuller claims to have woken up one day in New York to see the city plastered with posters promoting performances of the *Serpentine Dance* with no mention of her. KRAUT, *supra* note 7, at 63. She was further incensed to encounter the same situation when she arrived in Paris a few months later. *See id.* at 64. Other dancers were being hired to perform it instead, and other copycat dances were cropping up on both sides of the Atlantic. *See id.* at 63–64. These dancers were hired by various theaters to put on this performance and paid from the ticket sales of the evening. *Cf. id.* Fuller did not receive any of this money for copycat performances. *Cf. id.*

64 *Fuller*, 50 F. at 929.

65 *See id.*

66 *See* Martinetti v. Maguire, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9,173).

67 *See id.* The court's emphasis on the crude nature of *Martinetti* displays its understanding of choreography and dance as vulgar entertainment. *See id.* This association with prostitution and other immoral behaviors does not connect with their concept of copyright protection existing for the betterment of society. *See id.* The protection of immoral activity would, in the court's view, be to the detriment of society as it would encourage more of these performances. *See id.*

68 *Fuller*, 50 F. at 929.

69 *See id*.

70 *See id*.

infringement cases forward throughout the late 1800s and 1900s with mixed success.[71]

2. American Dance History

The inclusion of "choreographic works" in the Copyright Act must be understood within the context of American dance history prior to its enactment. Prior to the 1900s, recognition of dance and choreography was mostly limited to European ballet.[72] This Section illustrates the changes in dance culture that allowed its ascendency to a more respected art form in American culture.

American dance companies and choreographers became prominent in the mid-1900s.[73] George Balanchine ("Balanchine"),[74] the purported inventor of American ballet, founded, with the assistance of Lincoln Kirstein,[75] the Ballet Society in 1946, which later became the New York City Ballet ("NYC Ballet") in 1948.[76] NYC Ballet and its school, the School of American Ballet ("SAB"), have been producing American choreography for decades.[77] Under Balanchine's direction, the

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71 *See, e.g.*, Savage v. Hoffman, 159 F. 584, 585 (C.C.S.D.N.Y. 1908) (rejecting claim that imitating posture is copyrightable); Barnes v. Miner, 122 F. 480, 492–93 (C.C.S.D.N.Y. 1903) (holding stage act not protected because it does not "promote the progress of science and useful arts"). *But see* Daly v. Palmer, 6 F. Cas. 1132, 1135, 1139 (C.C.S.D.N.Y. 1868) (holding that an act of a musical is considered a "dramatic composition," and therefore, is entitled to protection).

72 *See* AU, *supra* note 14, at 87.

73 *See* ANDERSON, *supra* note 11, at 143–54.

74 The founding father of American Ballet, George Balanchine was a Russian dancer, turned choreographer, turned ballet master, in the mid-twentieth century. *George Balanchine*, N.Y.C. BALLET, https://www.nycballet.com/Explore/Our-History/George-Balanchine.aspx [https://perma.cc/U8PL-MPSZ] (last visited Nov. 30, 2017). Balanchine served as Ballet Master of the NYC Ballet company until his death, mentoring and training an entire generation of ballet dancers through his school, the School of American Ballet ("SAB") and the NYC Ballet. *See id.* at Subsection *Ballet Master*. Balanchine was a prolific choreographer, but is best known for his plot-less ballets performed with no scenery or fancy costumes, just simple leotards and tights. *See* AU, *supra* note 14, at 150.

75 Lincoln Kirstein was a scholar and patron of the arts whose greatest goal was to create an American dance company. *See id.* at 144. His fascination with dance started at an early age and his partnership with Balanchine began in 1933 with a pre-cursor dance company and SAB in 1934. *Id.* at 144–45.

76 *George Balanchine*, *supra* note 74, at Subsection *Dream Realized*.

77 See *George Balanchine*, supra note 74, at Subsections *Ballet Master* & *A Lifetime on Many Stages*. Original works made in America, typically by American choreographers, on American dance companies, or inspired by American life and culture.

NYC Ballet performed profitable ballet blockbusters like *The Nutcracker*, as well as developed experimental and artistic works in Balanchine's Black and White Ballets,[78] such as *Agon*[79] and *Serenade*.[80] Additionally, the American Ballet Theater Company ("ABT") was founded in 1939,[81] with a mission to foster the

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Cf. Choreography, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/art/choreography [https://perma.cc/J8PA-TLA4] (last visited Apr. 30, 2018). The concept is in opposition to the performance of Russian or Parisian choreography which has a different style both in the movement itself and the themes explored through the choreography. *See id.*

[78] These are ballets where the dancers perform in leotard and tights instead of a traditional costume. *See Balanchine Black & White*, N.Y.C. BALLET, https://www.nycballet.com/Season-Tickets/Spring-2018/Balanchine-Black-White.aspx [https://perma.cc/E37J-NC83] (last visited Apr. 30, 2018); Terry Trucco, *Balanchine Black & White*, PLAYBILL (May 26, 2015), http://www.playbill.com/article/balanchine-black-white [https://perma.cc/4GU9-34R8] (last visited Apr. 30, 2018). The intention is for the dancers' bodies to be the main focus of the experience so the ballet is stripped down to its fundamental technique. Trucco, *supra*. These Black and White Ballets are some of Balanchine's most famous and controversial works, still feeling modern when viewed for the first time by audiences today. *See, e.g.*, Alastair Macaulay, *[Fifty] Years Ago, Modernism Was Given a Name: 'Agon,'* N.Y. TIMES (Nov. 25, 2007), http://www.nytimes.com/2007/11/25/arts/dance/25maca.html [https://perma.cc/TH6J-U9GC].

[79] One of Balanchine's most famous Black and White Ballet's, *Agon* (1957) premiered to great controversy. *See* Macaulay, *supra* note 78. Named for the Greek word meaning "struggle," *Agon* includes choreography rife with tension between partners, culminating in the much-lauded *pas de deux* where a male and female dance, often a black male dancer and white female dancer, move in a constant battle of movement. *See id.* When *Agon* premiered it was controversial for its interracial appearance and for its daring lack of plot. *Id.* It remains one of Balanchine's most famous works and exemplifies his more modern pieces of choreography. *See id.*; *see also Agon*, N.Y.C. BALLET, https://www.nycballet.com/ballets/a/agon.aspx [https://perma.cc/7KNW-R24L] (last visited Mar. 3, 2018).

[80] *Serenade*, first performed in 1934, is a plot-less ballet where the female dancers wear long skirts creating dynamic patterns both with their bodies and their position in relation to one another. *See* Alastair Macaulay, *In Balanchine's 'Serenade,' Rituals and Gestures of Autonomy*, N.Y. TIMES (Oct. 6, 2016), https://www.nytimes.com/2016/10/07/arts/dance/in-balanchines-serenade-rituals-and-gestures-of-autonomy.html [https://perma.cc/KN9B-Q7NR]. *Serenade* is one of Balanchine's most famous works. *See* Macaulay, *supra*; *see also Serenade*, N.Y.C. BALLET, https://www.nycballet.com/ballets/s/serenade.aspx [https://perma.cc/JB2M-RFLD] (last visited Feb. 18, 2018).

[81] *Our History*, Subsection of *The Company*, AM. BALLET THEATRE, http://www.abt.org/the-company/about/#history [https://perma.cc/YUV9-6D3M] (last visited Apr. 30, 2018).

development of new choreographic works.[82] Across the country, the San Francisco Opera Ballet ("SF Ballet") was founded in 1933 by Adolph Bolm[83] and has become a national ambassador for American dance.[84]

NYC Ballet, ABT, and SF Ballet, considered the "triumvirate of great classical companies defining the American style on the world stage today,"[85] developed and matured in the early- to mid-1900s.[86] By the time choreography was considered for inclusion in the Copyright Act in the 1960s and 1970s, these companies defined a genre of American Ballet that was successfully worked into American culture[87] and firmly established as an art form easily identified as choreography within dance communities.[88]

Similarly, in the early twentieth century, Agnes de Mille ("de Mille"),[89] Bob Fosse ("Fosse"),[90] and Jerome Robbins ("Robbins")[91] were hugely successful in bringing choreography

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82 *Id.* George Balanchine, Antony Tudor, Jerome Robbins, Agnes de Mille, and Twyla Tharp have all created choreographic works for ABT. *Id.*

83 *1933*, Subsection of *History*, S.F. BALLET, https://www.sfballet.org/about/history [https://perma.cc/KL5V-L2KY] (last visited Nov. 30, 2017).

84 *See generally id.* (discussing the company's large international presence).

85 Luke Jennings, *One Step Closer to Perfection*, GUARDIAN (Feb. 18, 2017, 6:19 AM), https://www.theguardian.com/stage/2007/feb/18/dance [https://perma.cc/YYD6-NMZG].

86 *See supra* notes 76, 81, 83.

87 *See* AU, *supra* note 14, at 155.

88 *See id.*

89 Agnes de Mille was a notable dancer and choreographer since the early 1900s, largely known for her musical theater works. *Cf. Complete Danceography*, AGNES DE MILLE DANCES, http://www.agnesdemilledances.com/danceography.html [https://perma.cc/B84Z-GPXA] (last visited Dec. 10, 2017). Responsible for seventeen musical theater numbers, most notably *Oklahoma!* (1943), de Mille brought the more technical aspects of formal dance to the Broadway musical. *See Agnes de Mille*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/biography/Agnes-de-Mille [https://perma.cc/PD85-Z68B] (last visited Apr. 30, 2018). See *Complete Danceography*, *supra* for a complete biography and danceography.

90 Responsible for creating an entirely new Broadway style with awkwardly turned in knees and toes, and finger snapping, Fosse is still one of the most influential Broadway choreographers. *See* Lucy E. Cross, *Bob Fosse*, MASTERWORKS BROADWAY, http://www.masterworksbroadway.com/artist/bob-fosse/ [https://perma.cc/8XXL-TQF3] (last visited Apr. 30, 2018). His signature style can be seen in his Tony winning musicals, *The Pajama Game* (1955), *Damn Yankees* (1956), *Redhead* (1959), *Little Me* (1963), *Sweet Charity* (1966), *Pippin* (1973), *Dancin'* (1978), and *Big Deal* (1986). *See id.*

91 Perhaps best known in the dance world for succeeding Balanchine as the Ballet Master in Chief, Robbins is also renowned for his smash musicals such as *West Side*

into musical theater, transforming the Broadway musical into what we know today.[92] Indeed, one cannot think of a Broadway musical without assuming there will be some amount of fairly technical dance, thanks to the influence of these choreographers.[93] The stunning work of de Mille, Fosse, and Robbins raised the profile and profitability of choreography to the point where choreography became part of the national culture.[94] De Mille, in particular, used choreography to advance the plot of the musical, a fundamental change in the use of choreography in musical theater.[95] The integration of choreography into the musical format continued to define American styles of dance and legitimize choreography as an art form, while expanding the definition of choreography beyond classical ballet.[96]

Alongside the development of the ballet and musical theater worlds, modern dance was maturing into a full-fledged movement.[97] Almost entirely created in America, Modern dance began in the early 1900s with unconventional performances by Ruth St. Denis,[98] Ted Shawn,[99] and Martha Graham.[100] These early

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Story (1957) and *Fiddler on the Roof* (1964). See Amanda Vaill, *A Biography in Brief*, JEROME ROBBINS, http://jeromerobbins.org/a-biography-in-brief/ [https://perma.cc/2Y6H-KQB7] (last visited Apr. 30, 2018) for a full biography.

92 *See* AU, *supra* note 14, at 148–53.

93 *See id.*

94 *See supra* notes 89–91 and accompanying text.

95 *See* AU, *supra* note 14, at 150.

96 *See* AU, *supra* note 14, at 153 ("A period of expansion [the 1950s] had begun. No longer was there a single dominating concept of what ballet should be. Each choreographer had his own ideas, as well as his own followers and detractors. Each contributed his own vision to the increasingly kaleidoscopic world of dance.").

97 A style of dance developed in the twentieth century in reaction to ballet. *See supra* notes 85–96 and accompanying text. There is no particular defining feature except its rejection of classical ballet. *See generally* AU, *supra* note 14, at 148–53 (discussing the rise and distinguishing characteristics of modern dance). Often performed with bare feet and in less rigid costumes, Modern Dance was largely developed in America. *See generally id.*; *supra* notes 85–96 and accompanying text.

98 Ruth St. Denis was known for her orientalist style drawing on ethnic cultures for exotic, dramatic, and non-traditional movements. *See* Valeria Gómez-Guzmán, Ballet and Dance/Movement Therapy: Integrating Structure and Expression 12–13 (May 2017) (unpublished M.S. thesis, Sarah Lawrence College) (on file with the Digital Commons, Sarah Lawrence Library, Sarah Lawrence College).

99 Ted Shawn worked closely with Ruth St. Denis and had a similar style that drew upon ethnic movements for dramatic and exotic effect. *See id.*

pioneers broke off and all started forming their own companies, pushing the boundaries in different directions to redefine what counts as dance.[101] These companies, their students, and the future choreographers they inspired made the growth of modern dance in the mid-1900s a nationwide phenomenon.[102]

The confluence of ballet, modern, and Broadway dance styles growing in popularity, visibility, and profitability, resulted in dance being viewed as an art form, rather than a social dance or a lewd show.[103] Choreography's legitimatization in the mid-1900s helps explain why it was granted copyright protection in the Copyright Act of 1976. The growing sense that its rightful place in society was next to the great composers and artists of America was an important factor to the addition of "choreographic works" to the Copyright Act.[104]

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[100] *See infra* note 133–137 and accompanying text. Martha Graham pioneered the contract and release style of movement, using it as the foundational core of her works. *See infra* note 135 and accompanying text. Graham choreographed countless influential works, including many that are still performed today. *See The Company*, Subsection of *History*, MARTHA GRAHAM DANCE COMPANY, http://www.marthagraham.org/history/ [https://perma.cc/RK8C-BYZ2] (last visited Nov. 5, 2017). Graham continued to perform until 1969, and continued choreographing until her death in 1991, leaving behind over 180 different works. *See* AU, *supra* note 14, at 124; *The Company*, Subsection of *History*, *supra* (noting Graham's contribution of 181 works).

[101] *Cf.* AU, *supra* note 14, at 119 For example, Graham's exploration of the female perspective on movement, coming from the core and breath which was at times tied to its origination from the womb or pelvis, and her emphasis on the female gaze and experience, showed in her narrative works such as *Night Journey* discussed *infra* in note 133. *See* AU, *supra* note 14, at 119–20.

[102] *See* AU, *supra* note 14, at 155–73.

[103] *Cf.* PICART, *supra* note 37, at 96 (discussing how funding, choreography distinct to a particular artist, and the popularity of white choreographers among white audiences were crucial to the copyrightability of choreographic works at the time).

[104] The legitimization of American dance was a gradual process as this Section detailed. As explored in Kraut and Picart's books, as dance was associated more with whiteness and other types of privilege, it was seen more distinctly as an art form as opposed to a form of entertainment. *See generally* KRAUT, *supra* note 7; PICART, *supra* note 37. As discussed in *Martinetti* and *Fuller*, *supra* Section I.A.1, entertainment value was not considered a reason to protect choreographic works. The change in perception from entertainment to art was an essential mental step in American society in order for the legal framework to apply. *See* Fuller v. Bemis, 50 F. 926, 928–29 (C.C.S.D.N.Y. 1892), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541, 2544–45, *as recognized in* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 340–41 (S.D.N.Y. 2014); Martinetti v. Maguire, 16 F. Cas. 920, 922–23 (C.C.D. Cal. 1867) (No. 9,173).

3. Development and Dissemination of Dance Notation

In 1926, a codified dance notation[105] was invented by Rudolph Laban.[106] His style of notation, referred to as "Labanotation" approaches dance notation like writing music.[107] Labanotation was novel in its approach to detail by dealing in two dimensions: the body's movements and the timing of the movements.[108] This innovation enables the notation to be incredibly detailed, down to the movements of fingers, the syncopation of rhythm, and the intention of the choreographer for each movement.[109] As American dance repertoires were building in the 1940s, interest grew in the dance community to preserve as many choreographic works as

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[105] Most choreographers took notes of some kind, but would make little sense to another person who tried to recreate their choreography from the notes. *Cf.* ANDERSON, *supra* note 11, at 230 (discussing "sporadic attempts to devise systems of dance notation"). A codified dance notation is a uniform notation that has distinct rules used to describe movement. *See id.* This concept allows anyone who learns to read dance notation to reliably understand what the choreographer meant through the notes alone without the explanation by a former dancer or watching from a video. *See id.*

[106] Laban was a notable choreographer that developed "one of the most important" and "most successful" notations in the 1920s, which heavily influenced the Dance Notation Bureau, founded in New York in the 1940s. *Id.* The next innovation in dance notation came in the form of "Choreology" (also known as "Benesh notation" for its creators Rudolph and Joan Benesh), developed in 1955. *Id.* Codified dance notations such as Labanotation and Choreology sought to eliminate the imprecision of a choreographer's own form of notes and the memory of both choreographers and dancers in restaging of old works. *Cf. id.* (noting the influence of these two systems).

[107] *See id.*; *Read a Good Dance Lately?*, DANCE NOTATION BUREAU, http://dancenotation.org/lnbasics/frame0.html [https://perma.cc/GR5J-A47Y] (last visited Oct. 29, 2017). As discussed *supra* in notes 105–06, Labanotation provides a uniform way to capture the movement of the body in both horizontal and vertical directions as well as time simultaneously. *See Read a Good Dance Lately?*, *supra*. This is very similar to reading music as it denotes what each hand is doing separately, or what the hands are doing separately from the player's mouth movement if playing a wind instrument, in respect to their placement on the staff. *See id.* At the same time, music denotes timing through the type of notes, as well as a layer of volume and tone through notes, instructing the player to play quick, sharp notes, or soft, lilting notes. All of this information can be gathered in either case from the notation itself. *See, e.g.*, *id.*

[108] *See* George Gent, *Dance Groups Turn to Labanotation*, N.Y. TIMES (Mar. 25, 1971), http://www.nytimes.com/1971/03/25/archives/dance-groups-turn-to-labanotation.html?_r=0 [https://perma.cc/7UG5-B7CM] (describing a modern dance company that recreated a work through the use of Labanotation that had not been performed in twelve years and how no one involved in the production had seen the work in person before, which is an example in the break of the cycle of passing down dances remembered by older dancers and choreographers).

[109] *See id*.

possible in this way.[110] Using Labanotation made the widespread preservation of choreography possible and encouraged those outside the dance community to see choreography as a recordable art.[111]

Anthea Kraut, in her book *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance*, details some exchanges between the Copyright Office and the members of the dance community acknowledging the development of dance notation.[112] The letter exchange occurred between Richard MacCarteney at the Copyright Office and Ann Hutchinson at the Dance Notation Bureau.[113] Richard MacCarteney reached out to Ann Hutchinson to see if she had considered using dance notation as a tool for registering choreography with the Copyright Office.[114] Their correspondence revealed that the Copyright Office and the government was starting to view dance as a more valuable asset, similar to music and theater, and could add some protections at the Copyright Office level.[115] As Kraut synthesizes, "it is not much of a stretch to conclude that the growing legitimacy of American modern dance and ballet, the shifting landscape on Broadway, and the rising status of the white choreographer prompted a re-thinking among Copyright Office officials about dance's suitability for protection."[116]

This re-thinking is clarified in Congressional Study No. 28: *Copyright and Choreographic Work*s ("Varmer Study"), authored

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110 One such group is the Dance Notation Bureau. *See* KRAUT, *supra* note 7, at 192–93.

111 *See infra* notes 112–16.

112 *See* KRAUT, *supra* note 7, at 193 (citing Letter from Richard S. MacCartney, Chief of Reference Div., Copyright Office, to Ann Hutchinson, Dance Notation Bureau (July 19, 1950) (on file with the Dance Notation Bureau Archives)).

113 *Id.* (citing Letter from Richard S. MacCarteney to Ann Hutchinson, *supra* note 112).

114 *Id.* ("Describing himself as a 'lay admirer of the dance,' MacCarteney asked Hutchinson whether she had 'at all considered the possibility of copyrighting the scores of new ballets as expressed by the dance notation.' A Certificate of Copyright Registration, he ventured, 'may be of great value,' and he speculated that the copyright would protect not only the score but also the 'dance itself against performance except when authorized by the proprietor of the copyright.'" (quoting Letter from Richard S. MacCarteney to Ann Hutchinson, *supra* note 112)).

115 *See id*. ("[T]he [Copyright] Office added 'pantomimes' and 'ballets' to its list of examples of work that could be registered under Class D, dramatic and dramatic-musical compositions [in 1948].)"

116 *Id.* at 193–94.

by Borge Varmer in 1959.[117] Varmer's study on copyright and choreographic works emphasized that the widespread use of Labanotation helped define choreography as an art form for performance and entertainment rather than a social and leisure activity.[118] The evidence that Washington was taking note of dance notation as a way to fix choreography in a tangible medium resolved one of the major hurdles to considering choreography for copyright protection.

B. Pop Culture Examples: Beyoncé Giselle Knowles-Carter Infringes on Anne Teresa De Keersmaeker's Choreography

Anna Teresa De Keersmaeker is a choreographer known for her avant-garde and groundbreaking style that questions the connection between music and dance, while toying with geometric patterns.[119] De Keersmaeker founded her own dance company, Rosas, in 1983 after studying at the Mudra School in Brussels and Tisch School of the Arts in New York.[120] Her company premiered with *Rosas danst Rosas*, one of her most well-known and critically acclaimed works.[121]

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[117] Borge Varmer was an employee of the Copyright Office who researched and published the 1959 Study on choreography and copyright. *See* SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS OF THE COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 28: COPYRIGHT IN CHOREOGRAPHIC WORKS 89 (Comm. Print 1959) [hereinafter STUDY NO. 28] (authored by Borge Varmer).

[118] *See* STUDY NO. 28, *supra* note 117, at 93–94. This study discussed the consequences of potentially adding choreography to the Copyright Act. *See generally id.* Varmer's analysis covered what may be defined as choreography, as well as many of the potential benefits and drawbacks of such a change. *See id.* at 93–94. Prominent dancers, choreographers, and dance patrons weighed in on whether this was worth pursuing in letters submitted to append the report. *See id.* at 105–16.

[119] *Anne Teresa De Keersmaeker*, ROSAS, http://www.rosas.be/en/8-anne-teresa-de-keersmaeker [https://perma.cc/6H7F-8RDY] (last visited Dec. 10, 2017). For example, in her solo piece *Violin Phase* from *Fase, Four Movements to the Music of Steve Reich* (1981), De Keersmaeker swirled on a platform of sand and created with her steps a large circle, then traveled up and down the diameter of the circle, leaving behind an imprint of her geometric movement for the viewer to see. See *MOMA 'On Line' Series: Anne Teresa De Keersmaeker*, VIMEO (Apr. 1, 2011, 5:11 PM), https://vimeo.com/21823379, for a video at the Museum of Modern Art and Catherine de Zegher & Erin Manning, *Violin Phase*, ROSAS, http://www.rosas.be/en/publications/427-violin-phase [https://perma.cc/55HA-43NX] (last visited Mar. 27, 2018), for further details on the piece itself.

[120] *De Keersmaeker*, *supra* note 119.

[121] *See id*.

Beyoncé Giselle Knowles-Carter, an internationally acclaimed music artist known for her dance prowess, better known simply as Beyoncé, debuted her music video to her new single "Countdown" in 2011.[122] The music video featured references to various icons of the mid-1900s.[123] Additionally, the choreography featuring Beyoncé and backup dancers looked quite similar to De Keersmaeker's choreography from two of her well-known works– *Rosas danst Rosas* from 1983 and *Achterland* from 1990.[124]

Both *Achterland* and *Rosas danst Rosas* were recorded as films and are publicly available as full movies.[125] While dance has traditionally been an unrecorded art form, the widespread use and lower costs of video in the 1990s could have helped enable choreographers to better document their work. Journalists within the dance community and dance enthusiasts in the public took notice and side-by-side videos comparing the relevant portions of both began appearing online.[126] De Keersmaeker initially

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[122] KRAUT, *supra* note 7, at 263.

[123] *Id.* (including Audrey Hepburn, Andy Warhol, and Diana Ross). These references included standing in Hepburn's iconic poses, and the cycling of bright backgrounds or costume colors in the same scene. *See* fundifferent1, *Split Screen: Beyoncé "Countdown" vs Anne Teresa De Keersmaeker*, YOUTUBE (Oct. 13, 2011), https://www.youtube.com/watch?v=PDT0m514TMw (showing content from Beyoncé's *Countdown* music video and various works by De Keersmaeker).

[124] KRAUT, *supra* note 7, at 263; *see also* James C. Mckinley Jr., *Beyoncé Accused of Plagiarism Over Video*, N.Y. TIMES (Oct. 10, 2011, 5:50 PM), https://artsbeat.blogs.nytimes.com/2011/10/10/beyonce-accused-of-plagiarism-over-video/ [https://perma.cc/4BC8-LYF5]. In the scenes where *Achterland* choreography appears, the background dancers rolled on the floor in the same manner as De Keersmaeker's choreography. *See* fundifferent1, *supra* note 123. There was also a close up, using the same camera angle as the video fixing the choreography, on Beyoncé as she swings her hips with her hands flat at her sides before joining in the backup dancers in continued rolling on the floor. *See id.* Later on in the video, Beyoncé and some of her backup dancers sat in chairs doing a series of gesticulations that constituted the majority of *Rosas danst Rosas*. *See id.* The choreography of sitting in chairs with the dancers wearing heavy shoes moving through a repetitive set of motions was part of why De Keesmaeker's *Rosas danst Rosas* was so controversial and recognizable in the Countdown video. *See id.*

[125] ANNE TERESA DE KEERSMAEKER, ACHTERLAND (Alice in Wonderland 1994); ANNE TERESA DE KEERSMAEKER, ROSAS DANST ROSAS (Thierry De Mey 1997).

[126] *See, e.g.*, McKinley Jr., *supra* note 124; fundifferent1, *supra* note 123. For example, at the end of Beyoncé's video the dancers sat in chairs wearing schoolgirl-reminiscent clothing. *See* fundifferent1, *supra* note 123. Beyoncé and the dancers completed a series of gestural movements in these chairs in an organized manner. *See id.* This scene was strikingly similar to scenes of De Keersmaeker's *Rosas danst Rosas*, where four dancers

responded with a statement denouncing the infringement.[127] Beyoncé responded saying that she had been inspired by De Keersmaeker's work.[128] Through her dance company, De Keersmaeker contacted the producer of the "Countdown" video, Sony, insisting they stop showing the music video without her permission.[129] There was no other public exchange, but there is speculation that they reached a settlement agreement.[130]

Beyoncé's potential infringement on De Keersmaeker's work sparked a discussion in the dance community regarding the copying of works and the fairness of current processes both for those who copy and those who are copied.[131] One central question to emerge from the discussion grappled with the question of where inspiration ends and copying begins.[132] This conflict is one of the most prominent recent examples of choreography copying and is worth exploring to better understand the applicable standards in potential choreography copyright infringement claims.

C. Relationship Between Martha Graham and Paul Taylor's Core Choreographic Styles

Martha Graham is frequently referred to as the mother of modern dance for her revolutionary style and her training of a whole new generation of modern choreographers.[133] After studying

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sat in chairs wearing heavy clog-like shoes and rumpled outfits reminiscent of a schoolgirl. *See id.* They also did a series of gestural movements while seated in a precise formation. *See id.*

127 *See* Charlotte Higgins, *Beyoncé Pleasant but Consumerist, Says Plagiarism Row Choreographer*, GUARDIAN (Oct. 11, 2011, 3:06 PM), https://www.theguardian.com/music/2011/oct/11/beyonce-pleasant-consumerist-plagiarism-row [https://perma.cc/d47q-w9eh] (quoting De Keersmaeker).

128 *See id.* (quoting Beyoncé).

129 KRAUT, *supra* note 7, at 273.

130 *Id.* (noting how De Keersmaeker was credited as a co-choreographer when the video won awards and was credited in the official version of the video available online).

131 *See generally, e.g.*, *id.* at 263–80 (encompassing one such discussion).

132 *See, e.g.*, *id.* at 272–77.

133 *See* AU, *supra* note 14, at 119–25; *About the Dancer*, Section of *Martha Graham: Revolt and Passion*, AM. MASTERS (Sept. 16, 2005), http://www.pbs.org/wnet/americanmasters/martha-graham-about-the-dancer/497/ [https://perma.cc/L4X4-W35Y]. Many of her earliest works were abstractions, such as her famous *Lamentation* (1930), where she sits on a bench in a cloth tube that she stretches with her body in various ways to depict the intense grief of a woman. See the piece provided by the Martha Graham

at one of the earliest modern dance schools, Graham left in 1923 to start her own company and break away from more established modern choreographers.[134] Graham developed a distinct style of movement all based on a form of breathing inspired by contraction and release.[135] Movement in the Graham technique comes from the constant push and pull between contraction and release,[136] morphing into the spiral motion as well, which generates movement from the contraction and release into a twisting motion.[137]

Paul Taylor was a part of the next generation of great choreographers, simultaneously drawing inspiration and training from his predecessors and teachers.[138] Initially, Taylor was a dancer in Graham's company for a time, but later left to start his own company in which he employed his own choreographic style.[139] He is primarily known for his provocative and humorous

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Dance Company at Martha Graham Dance Company, *Martha Graham in Lamentation*, YOUTUBE (Apr. 28, 2016), https://www.youtube.com/watch?v=I-lcFwPJUXQ. Her slightly later works incorporated more narrative and dramatic elements, such as *Night Journey* (1947), Graham's version of the Greek play *Oedipus Rex* from the perspective of the doomed Iocasta, and *Appalachian Spring* (1944), a celebration of the domestic values of American Pioneers on the frontier in the mid-nineteenth century through the lens of a wedding ceremony to embark on a new journey. *See* AU, *supra* note 14, at 122–24. Graham continued to perform until 1969, and continued choreographing until her death in 1991, leaving behind over 180 different works. *See id.* at 124; *see also The Company*, Subsection of *History*, *supra* note 100.

134 *See* AU, *supra* note 14, at 120–22.

135 *Id.* at 119–20 (discussing how the contraction curves the back and chest inwards, drawing the dancer to her center on an exhale, and the release expands the chest on an inhale).

136 *See, e.g.*, Martha Graham Dance Company, *The Martha Graham Dance Legacy Project*, YOUTUBE (Apr. 28, 2016), https://www.youtube.com/watch?v=vitRYWTQuys. The Martha Graham Dance Legacy Project is a group of dancers who learned from the late Martha Graham and seek to document as much of her technique as possible before the original technique is forgotten. *Cf. The Documentation of the Graham Technique*, DANCE SPOTLIGHT, http://www.dancespotlight.com/graham/ [https://perma.cc/U88Z-J868] (last visited Mar. 3, 2018) (describing efforts to keep the technique alive).

137 *See, e.g.*, BBNOS, *Martha Graham Technique Spiral*, YOUTUBE (Sept. 9, 2014), https://www.youtube.com/watch?v=E8p9Fpyv4ng (showing walk through of a spiral motion).

138 *See* AU, *supra* note 14, at 155.

139 *See id.* at 161.

works.[140] Typically less remarked upon is how Taylor's movement style often relies upon key elements of Graham's technique.[141] Although Taylor utilizes many different kinds of movements that do not fall within the Graham technique, in his more virtuosic works, the use of contract and release technique is apparent.[142] The similarities between his works and Graham's signature technique may raise questions regarding his originality.

II. UNDERSTANDING THE APPLICATION OF THE COPYRIGHT ACT TO A CHOREOGRAPHY LAWSUIT

Since the passage of the Copyright Act of 1976, very few choreographers have brought choreography copyright infringement lawsuits, and most cases have done little more than determine what constitutes choreography, which is discussed in greater detail in Section II.B.[143] The lack of clarity of how an action would proceed may hinder potential claimants. This Part seeks to clarify the legal standards that would apply to a choreography copyright infringement suit by examining in turn the different portions of a suit. Section II.A details the statutory authority and requirements for the initial claim. Section II.B explores a definition of choreography, as none is provided in the statute. Lastly, Section II.C determines the standard for infringement.

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[140] *See id.* at 161–63. For example, one of his more famous works, *Esplanade* (1975), is known for its virtuosic jumps. *See id.* at 161. Dancers hurl themselves across the stage over and over again in huge leaps that land them sliding on the floor. *See id.* The continuous level of physicality delighted audiences and was a provocative use of his dancers. *Cf. id.* 160–64 (cataloguing the physical aspects of Taylor's works that brought him success). Another example is Taylor's piece *Cloven Kingdom* (1976), where "elegantly dressed" dancers explored the animalistic tendencies buried beneath human convention, a humorous and simultaneously provocative dance. *See id.* at 164.

[141] The Graham concept of contract and release that is extrapolated into movement for every part of the body as discussed *supra* in notes 135–36 and accompanying text was later codified into the Graham technique. *See The Documentation of the Graham Technique*, *supra* note 136.

[142] *See* Marina Harss, *A Form of Order: On Paul Taylor*, NATION (Sept. 12, 2012), https://www.thenation.com/article/form-order-paul-taylor/ [https://perma.cc/ZJ96-GNVM]. *See generally* Paul Taylor, *Mercuric Tidings* (1982); Paul Taylor, *Roses* (1985); Paul Taylor, *Promethean Fire* (2002).

[143] *See infra* Section II.B; *see also, e.g.*, Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC, 803 F.3d 1032, 1043 (9th Cir. 2015); Horgan v. Macmillan, Inc., 789 F.2d 157, 160–61 (2d Cir. 1986).

A. Statutory Authority

As a threshold matter, the Copyright Act requires the copyrighted material to be "fixed in any tangible medium of expression."[144] The legislative history suggests filming or notating a choreographic work would be sufficient for fixing it in a tangible medium.[145] Assuming the choreography in question is an original work of authorship, more than a mere idea, and "fixed" in some way, an inquiry of liability would follow.[146] The statute also makes a distinction between systems or ideas and expressions of such ideas.[147] If the claim does not constitute an assertion that an idea or system is copyrighted, the lawsuit may proceed to the liability inquiry.[148] The distinction between an expression and an idea is important in preventing over-protection.[149] This idea-expression

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[144] 17 U.S.C. § 102(a) (2012); *see also* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2545.

[145] *See* H.R. REP. NO. 94-1476, at 52–53 (1976); S. REP. NO. 94-473, at 114 (1975). Section 102 of title 17 of the U.S. Code provides in relevant part:

> (a) 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. Works of authorship include the following categories: (1) literary works; (2) musical works, including 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. (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102 (emphasis added).

[146] *See* 17 U.S.C § 102.

[147] *See id.* § 102(b). "The idea-expression dichotomy allows anyone to use ideas without seeking permission from the person who first expressed those ideas, but does not allow the use of the expression of those ideas." 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19E.04(B) (2018).

[148] *See* 17 U.S.C. § 102.

[149] *See id.* § 102(b); NIMMER & NIMMER, *supra* note 147, § 19E.04(B) ("Ideas are raw materials that serve as building blocks for creativity, thus enabling authors to build on previous ideas and works. Freely using ideas enables authors to stand on the shoulders of giants, i.e., their predecessors, and thus see farther than those giants. An author need not rethink anew the entire human experience when creating a new work of authorship.

dichotomy ensures that innovation can occur, as "[i]deas are raw materials that serve as building blocks for creativity."[150] Consequently, it enables "authors to build on previous ideas and works."[151]

B. What Constitutes Choreography Remains Undefined

When the term "choreographic works" was added to the Copyright Act of 1976, Congress provided no definition for it,[152] as they deemed the term "fairly settled," and no changes have been made since.[153] The guidance provided in the statute recognizes that choreography does not include "social dance steps and simple routines."[154] The lack of case law and legislative guidance[155] on this definition left potential claimants with no sense of a legal definition, as first discussed in *Horgan v. Macmillan*.[156]

Horgan is a seminal choreography copyright claim case.[157] In *Horgan*, George Balanchine's estate sued Macmillan, a photographer who published a book about the *Nutcracker*, including sixty photographs of Balanchine's production, for copyright infringement.[158] Before his death, Balanchine registered *The Nutcracker* with the Copyright Office, leaving a videotape of a

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Beyond being impossible as a practical matter, that course of action would represent a waste of resources and time, stifling creativity in the process. Accordingly, ideas remain unprotected by copyright law.").

150 NIMMER & NIMMER, *supra* note 147, § 19E.04(B).

151 *Id*.

152 *See generally* Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541, 2545 (codified at 17 U.S.C. § 102(a)) (providing no definition for the term "choreographic works").

153 H.R. REP. NO. 94-1476 (1976), at 53; S. REP. NO. 94-473, at 52 (1975).

154 H.R. REP. NO. 94-1476, at 53–54; S. REP. NO. 94-473, at 52.

155 *See supra* text accompanying notes 152–56 (exemplifying Congress' and the Act's failure to define the term). Only a single discussion regarding the addition of choreographic works to the Copyright Act exists in Discussion of Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. *See* DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 88TH CONG., 1ST SESS. (H. Comm. Print 1968), at 7–9. The Report contains comments that the addition of choreographic works will overrule the old doctrine that only choreography that has a plot will be considered for protection. *See id.*

156 789 F.2d 157, at 160–61 (2d Cir. 1986). N.B. this case is only binding in the Second Circuit.

157 *See generally id.*

158 *Id.* at 158–60.

dress rehearsal on file.[159] When Macmillan was producing his book of the ballet, the executrix of Balanchine's estate brought an infringement claim over the choreography against Macmillan in the U.S. District Court the Southern District of New York.[160] After "choreographic works" was added to the Copyright Act, *Horgan* was the first case to seek protection under the new statute and one of the few cases that discussed the actual definition of choreography under the law.[161] The court in *Horgan* relied heavily on the Compendium of Copyright Office Practices, Compendium II (1984)[162] ("Compendium II"):

> [C]horeographic works [are defined] as follows:
>
> > Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright.
>
> Section 450.01. Under "Characteristics of choreographic works," Compendium II states that[:]
>
> > Choreography represents a related series of dance movements and patterns organized into a coherent whole.
>
> Section 450.03(a). "Choreographic content" is described as follows:
>
> > Social dance steps and simple routines are not copyrightable. . . . Thus, for example, the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. However, this is not a restriction against the

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159 *Id.* at 158.

160 *Id.*

161 *See id.* at 160–61. Also see Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC, 803 F.3d 1032, 1043 (9th Cir. 2015), more fully discussed *infra* in notes 194–98.

162 U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES (1984). Compendium II is a document issued for guidance by the Copyright Office that *Horgan* uses to determine a definition of choreography. *See infra* note 165 and accompanying text.

> incorporation of social dance steps and simple routines . . . . Social 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.[163] Section 450.06.

This definition included more than was permissible under the 1909 Copyright Act, as it expressly allowed for works without a plot.[164] This is a key broadening as more recent choreographic works often lack a plot.[165] Consequently, the definition in Compendium II as adopted in *Horgan* is quite generous.[166] However, it is potentially not broad enough to protect current dance styles, where the line between performance art and choreography has become increasingly blurred.[167] For example, in his work *Duet*, Taylor was completely motionless with a commissioned score from John Cage[168] of complete silence for

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[163] *Horgan*, 789 F.2d at 161 (quoting U.S. COPYRIGHT OFFICE, *supra* note 162, §§ 450.01, 450.03(a), 450.06).

[164] Section 5 of the Copyright Act of 1909 provided the following works were eligible for protection:

> (a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations; (b) Periodicals, including newspapers; (c) Lectures, sermons, addresses, prepared for oral delivery; (d) Dramatic or dramatico-musical compositions; (e) Musical compositions; (f) Maps; (g) Works of art; models or designs for works of art; (h) Reproductions of a work of art; (i) Drawings or plastic works of a scientific or technical character; (j) Photographs; (k) Prints and pictorial illustrations . . . .

Pub. L. No. 60-349, 35 Stat. 1075.

[165] *See supra* Section I.A.

[166] *See supra* note 164 and accompanying text (showing how the *Horgan* court adopted the definition established by Compendium II).

[167] More experimental works incorporate elements of spoken word or lack music, and music is typically thought of as a key element of what constitutes choreography. *See, e.g.*, *Horgan*, 789 F.2d at 161; U.S. COPYRIGHT OFFICE, *supra* note 162, § 450.01. New York Live Arts is a venue that often houses such experimental work, which can be incredibly abstract. *See generally About*, N.Y. LIVE ARTS, https://newyorklivearts.org/about/ [https://perma.cc/Q4QW-2NHV] (last visited May 2, 2018) (discussing the venue's commitment to emerging talent and "body-based investigation that transcends barriers between and within communities").

[168] John Cage was an American composer who worked closely with Taylor and other Modern choreographers. *See* AU, *supra* note 14, at 160–61; *John Cage*, ENCYCLOPAEDIA

four minutes.[169] Under the Compendium II definition, *Duet* might not be considered a choreographic work as it is not a movement or pattern, nor accompanied by music.[170] However, one versed in modern dance would know that any other work where performer and musician are silent and immobile for four minutes would likely be copying Taylor's work. To ensure such avant-garde works are protected, a more expansive definition may be necessary.

In other courts, the analysis again starts at Congress' lack of a definition.[171] While it is likely reasonable to assume the Second Circuit's analysis in *Horgan* would be the starting point for any analysis of future choreography suits, there are other sources that could affect this fairly fact-intensive decision.[172] When Congress began considering adding choreography to the Copyright Act, the Varmer Study[173] explained how choreography would work within the general framework of copyright law.[174] The Varmer Study made it clear that a narrative element would easily qualify a dance piece as protectable choreography, such as classical ballets.[175] However, Varmer suggested that implementing the solution

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BRITANNICA, https://www.britannica.com/biography/John-Cage [https://perma.cc/J4PN-V3J3] (last visited Apr. 30, 2018).

169 Mary Wegmann, *Paul Taylor (1930 -)*, Subsection of *Paul Taylor - More Resources*, DANCE TREASURES, http://dhctreasures.omeka.net/taylor2 [https://perma.cc/H93H-NJKE] (last visited Mar. 29, 2018). *See generally* Paul Taylor, *Duet* (1957).

170 *See supra* note 165 and accompanying text.

171 *See, e.g.*, Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC, 803 F.3d 1032, 1043 (9th Cir. 2015) (discussing briefly the lack of definition for "choreographic works" and referencing the Second Circuit's interpretation); Krawiec v. Manly, No. 15 CVS 1927, 2016 WL 374734, at *3 (N.C. Super. Jan 22, 2016) (mentioning there is no definition of 'choreographic works' included in the statute and referencing no other case law on that point).

172 *See, e.g.*, *Bikram's Yoga Coll. of India, L.P.*, 803 F.3d at 1043–44 (beginning its discussion of choreography with the Second Circuit's opinion and its reliance on Compendium II, but moving on to consider other factors, such as the adaptability of section 102 of the Copyright Act).

173 A Dutch-born Lawyer at the U.S. Copyright Office. *See Borge Varmer*, Subsection of *Obituaries*, WASH. POST (Oct. 12, 1996), https://www.washingtonpost.com/archive/local/1996/10/12/obituaries/42012ccc-451b-4d88-b12f-b31cf9bbef71/?utm_term=.753db59692bb [https://perma.cc/DK4F-2ZX8].

174 *See generally* STUDY NO. 28, *supra* note 117 (discussing choreography's possible inclusion as copyrightable subject matter under a system of dance notation).

175 "[A] choreographic work should constitute an original creation of dance movements to be performed for an audience, conveying some story, theme, or emotional concept." *Id.* at 101.

Congress adopted in the Copyright Act of 1976, inserting "choreographic works" as a separate and distinct category, required a more concrete definition.[176] Under Varmer's analysis, the general consensus both in the United States and in other countries was that "dramatic works" inherently included choreography.[177] It is left open whether other abstract dance movements would be considered choreography under the law.[178] Varmer's Study appeared to suggest this is not a desirable outcome and the intention should be to protect "theatrical dances," which would include works such as ballets.[179]

The Nutcracker discussed in *Horgan* would undoubtedly fall under the definition put forward in the Varmer Study.[180] *Horgan* centers on George Balanchine's *The Nutcracker*, a narrative ballet based on a nineteenth-century folk tale by E.T.A. Hoffman.[181] However, other less narrative works, such as Balanchine's *Serenade*, may fall outside the definition adopted in *Horgan*.[182] *Serenade* was not choreographed with any intentional story, but nobody would argue that the mesmerizing, synchronized, and practiced movements the group of dancers create is not choreography.

While new territory at the time of its premiere, ballet remains the most conventional form of dance.[183] The Varmer Study, when applied to more contemporary and experimental works such as Merce Cunningham's ("Cunningham") *Scenario*, may disqualify many great works of the last few decades. *Scenario* has no plot and made use of computer technology to choreograph the dancer's

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176 *See id.* at 102. Although Varmer did not propose a definition, he did comment that it would need to be something more precise. *See id.*

177 *See id.*

178 "There is little authority on this point, but there is reason to believe that 'dramatic compositions' might include choreographic works that depict a theme or emotion other than a 'story' in the literal sense of a sequence of events." *Id.* at 101.

179 *See id.* at 102.

180 *The Nutcracker* is a narrative ballet performed for an audience, fulfilling the easier standard set out by the Varmer Study. *See* Horgan v. Macmillan, Inc., 789 F.2d 157, 158 (2d Cir. 1986); STUDY NO. 28, *supra* note 117, at 101–02.

181 *See Horgan*, 789 F.2d at 158.

182 *See* John Clifford, *Serenade*, YOUTUBE (Sept. 2, 2016), https://www.youtube.com/watch?v=Xd9R9S6-9E4; *see also Serenade*, *supra* note 80.

183 *See* AU, *supra* note 14, at 176–93.

movement in bulky and bulging costumes.[184] Under the scope of the Varmer Study, Cunningham's work would be difficult to categorize as choreography.[185] However, Cunningham is considered one of the great Modern choreographers.[186] Like with *Serenade*, it would not make sense to discount one of the discipline's great works as outside the scope of choreography.

An additional piece of evidence to support a broader reading of choreographic works is the legislative history of the addition of choreographic works to the Copyright Act of 1976.[187] At the proposal of choreographic works to the statute, there was explicit discussion that this inclusion would overrule the case law development that only those choreographic works with plot would be considered protected.[188] This indicates congressional intent to be more expansive and intentionally keep the definition broad to account for future developments.[189]

A final source that could substantially affect a court's analysis of choreographic works is the *Copyright Registration of Choreography and Pantomime*, Circular 52 ("Circular 52"), issued by the U.S. Copyright Office.[190] Circular 52 identified common elements of choreographic works, including: (1) "Rhythmic movements of one or more dancers' bodies in a defined sequence and a defined spatial environment, such as a stage[;]" (2) "[a] series of dance movements or patterns organized into an integrated, coherent, and expressive compositional whole[;]" (3) "[a] story,

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184 *See* Alastair Macaulay, *There Is So Much that Must Live On*, N.Y. TIMES (July 18, 2014), https://www.nytimes.com/2014/07/20/arts/dance/merce-cunninghams-dance-legacy.html [https://perma.cc/YB8R-YWEL]; *see also Scenario*, MERCE CUNNINGHAM TR., https://www.mercecunningham.org/index.cfm/choreography/dancedetail/params/work_ID/163/ [https://perma.cc/7ZEK-WBXB] (last visited Nov. 4, 2017).

185 STUDY NO. 28, *supra* note 117.

186 AU, *supra* note 14, at 155–60.

187 *See generally* DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 88TH CONG., 1ST SESS. (H. Comm. Print 1968).

188 *See id.* at 8–9.

189 *See id*.

190 U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME, Circular 52 (revised Sept. 2017), https://www.copyright.gov/circs/circ52.pdf [https://perma.cc/P3LF-BURH]. This document is the most recent guidance the Copyright Office has issued on a definition of choreography and one of the few governmental sources on the topic.

theme, or abstract composition conveyed through movement[;]" (4) "[a] presentation before an audience[;]" (5) "[a] performance by skilled individuals[;]" and (6) "[m]usical or textual accompaniment[.]"[191]

These elements, recognized by the Copyright Office, explicitly include non-narrative works in its scope, an important indication that people within the sphere of choreography copyright infringement are open to a broader definition of choreographic works.[192] For pieces like *Scenario* or *Serenade*, these guidelines are much more encouraging.[193]

However, the expanding definition of choreographic works was stopped short by a recent case, *Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC*.[194] In *Bikram*, the Ninth Circuit was tasked with determining if a yoga sequence constituted a choreographic work when the Bikram's Yoga College of India sued another yoga studio for copyright infringement of their yoga sequences and technique.[195] The court first looked to *Horgan* for guidance, but deemed yoga too far removed from any known definition of choreography.[196] Additionally, the court held that the yoga sequences, since marketed as a healing art, were processes not copyrightable under 17 U.S.C. § 102(b).[197] *Bikram* created a firm line at the experimental end of choreographic works that yoga does not count.[198]

Synthesizing all these potential sources for a definition of choreographic works results in a very fact intensive inquiry to

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191 *Id.* at 1.

192 *See id*.

193 While Circular 52 presented a very generous view of choreography, it did not go so far as to include yoga positions. *See id.* at 3. They are not protected, most likely an adoption of the recent Ninth Circuit decision refusing to grant Bikram's Yoga College of India's sequences copyright protection. *See* Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC, 803 F.3d 1032, 1044 (9th Cir. 2015) (holding yoga sequence is not copyrightable because it is an idea, not an expression of an idea).

194 803 F.3d 1032.

195 *See id.* at 1035–36.

196 *See id.* at 1043–44 (citing Horgan v. Macmillan, Inc., 789 F.2d 157 (2d Cir. 1986)).

197 *See id.* at 1042; *see also* 17 U.S.C. § 102(b) (2012).

198 This bright-line rule would only be binding in the Ninth Circuit, but would most likely be honored because of its specific exclusion in Circular 52. *See* U.S. COPYRIGHT OFFICE, *supra* note 190, at 3.

determine if a work more closely resembles *The Nutcracker*, held protectable in *Horgan*,[199] or a yoga sequence, held not protectable in *Bikram*.[200] Absent additional legislation, this standard will only become clearer with subsequent litigation on the issue. When a choreography copyright infringement claim rises to the level of being considered a choreographic work, it is deemed worthy of protection and can proceed to an infringement analysis.[201]

C. What Is Infringement?

The next step in a choreography copyright infringement inquiry is to determine if there was infringement of said choreographic work.[202] At this point, no precedent has proceeded to a point in litigation where the court has answered the question of what constitutes copyright infringement of a choreographic work.[203] Assuming ownership is not at issue,[204] a plaintiff can argue that the defendant copied the plaintiff's work.[205] Within the requirement for copying are two distinct questions: direct copying and copying that constitutes an improper appropriation.[206] After proving both points, an affirmative fair use defense may prevent liability even if there is infringement.[207]

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[199] *See generally Horgan*, 789 F.2d 157 (holding a narrative choreographic work protectable).

[200] *See generally Bikram's Yoga Coll. of India, L.P.*, 803 F.3d 1032.

[201] *See* 17 U.S.C. § 102.

[202] *See id*.

[203] *See supra* Section II.B.

[204] Litigation concerning who owns a particular copyrighted choreographic work, as opposed to whether a choreographic work has been infringed, is not discussed in this Note because it has been explored in greater detail following *Martha Graham School & Dance Foundation, Inc., v. Martha Graham Center of Contemporary Dance*. *See generally* 380 F.3d 624 (2d Cir. 2004) (discussing extensively throughout the case the issue of copyrighted choreography ownership). For a discussion, see Sharon Connelly, Note, *Authorship, Ownership, and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 837 (2005).

[205] *See* NIMMER & NIMMER, *supra* note 147, at § 13.01(B).

[206] *See* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 427–28 (6th ed. 2014).

[207] *See* 17 U.S.C. § 107.

1. Direct Copying

To prove direct copying, the easiest (and rarest) proof is direct evidence showing the defendant copied the work.[208] Absent such obvious proof, a plaintiff must show there was (1) access to the original work; and (2) probative similarity.[209] These standards seek to show that the protected copyright was in fact copied, not created independently and coincidentally the same.[210]

To prove access, a "plaintiff must show that defendant had a reasonable opportunity to view or copy the work."[211] This is demonstrated in many ways, such as if the defendant was associated in the production of the original work,[212] or if the work was widely-disseminated.[213] Even if two works are incredibly similar, infringement is not automatically proven.[214] Direct copying asks if the works are similar even in their uncopyrightable elements to see if the alleged infringing work was copied or if it was independently developed.[215]

2. Improper Appropriation: Substantial Similarity

If an alleged infringement does not satisfy the standard of direct copying, a claim can still succeed if the copied work was "substantially similar."[216] Substantial similarity requires either: (1) "comprehensive nonliteral similarity," meaning the "fundamental essence or structure of one work is duplicated in another," where

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208 *See* LEAFFER, *supra* note 206, at 429.

209 *See id.*

210 *See id.* at 427–28.

211 *See id.* at 429.

212 *See, e.g.*, Smith v. Little, Brown & Co., 245 F. Supp. 451, 452–53, 458 (S.D.N.Y. 1965), *aff'd*, 360 F.2d 928 (2d Cir. 1966).

213 *See, e.g.*, Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 179 (S.D.N.Y. 1976).

214 *See* LEAFFER, *supra* note 206, at 428 ("A work is copyrightable if original and independently created, even though it is identical to another copyrighted work.").

215 *See id.* at 431; *see also, e.g.*, *infra* note 224 and accompanying text.

216 *See* Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 138 (2d Cir. 1998) (noting the alleged infringement must be "quantitatively *and* qualitatively sufficient" in respect to the expression and the amount copied to establish copyright infringement (emphasis added) (quoting Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir.1997))); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1398 (9th Cir. 1997) ("Seuss must demonstrate 'substantial similarity' between the copyrighted work and the allegedly infringing work.").

the copied elements are not necessarily in the same order as the original, hence nonliteral; or (2) "fragmented literal similarity," meaning where the total of small copied segments turns into a "substantial" amount copied.[217] In a choreography copyright infringement claim, comprehensive nonliteral similarity would likely cover works where the choreography's overall essence was copied, but perhaps poorly executed, or mistakenly changed, but is so recognizable that it is in essence the same choreography.[218] Fragmented literal similarity is likely satisfied if notation or spoken phrases were copied in large enough quantities that added up to a significant portion of the allegedly copied work.[219] These are very fact-intensive inquiries and may turn on a court's overall feeling.[220]

Comprehensive nonliteral similarity is demonstrated in cases such as *Schroeder v. William Morrow & Co.*, where the court held a gardening directory was substantially similar because the formatting and compilation was so similar as to duplicate its core essence.[221] In *Schroeder*, the copyrighted material in question was a gardening directory that listed in a particular order and style information on supplies and equipment for gardeners.[222] The infringing work listed the same information in such a similar order and format that the court concluded it could not have been developed independently.[223] *Schroeder* demonstrated how material that is not copyrightable on its own can still receive copyright protection based on its presentation.[224] Despite the infringed material not being copied literally word for word, the amount of

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217 NIMMER & NIMMER, *supra* note 147, at § 13.03(A)(1)–(2).

218 *See id.*

219 *See id.*

220 *See, e.g.*, *Castle Rock Entm't, Inc.*, 150 F.3d at 140–41.

221 566 F.2d 3, 5–6 (7th Cir. 1977).

222 *See id.* at 4.

223 *See id.* at 5–6.

224 *See id.* at 5. The order of the gardening directory is not copyrightable if it is not creative, or if it is the result of a logical process (such as alphabetical or numerical ordering), because under the Copyright Act of 1976, it is most likely an idea or system, not an expression. *See* 17 U.S.C. § 102(b) (2012). The expression (i.e., overall compilation), which in this case *was* creative and proved the nonliteral similarity, is where the copyright infringement comes in. *See id.*

copying was so overwhelmingly similar that it constituted comprehensive nonliteral similarity.[225]

When there is literal similarity, as in word for word, it is easy to recognize that as substantially similar.[226] However, where there is fragmented literal similarity the small segments must all add up to a significant amount of direct copying.[227] An example is *Ringgold v. Black Entertainment Television, Inc.*, where the court held the use of a copyrighted poster satisfied the substantial similarity requirement.[228] In *Ringgold*, a copyrighted poster created by the contemporary artist Faith Ringgold was used in the set design of an HBO sitcom about an African American family without her permission.[229] The shots of the poster in the HBO show, when considered cumulatively, were substantial enough to rise to the level of substantial similarity.[230] Under the substantially similar theory, the court will find infringement has occurred if there is enough evidence, even if no literal similarity is noted.[231]

3. Affirmative Defense of Fair Use

The fair use doctrine is an affirmative defense to copyright infringement claims that developed out of *Folsom v. Marsh* in 1841.[232] It was later codified in section 107 of the Copyright Act of 1976.[233] The codified doctrine consists of four factors that must all be considered.[234] The four factors are:

> (1) [T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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225 *See Schroeder*, 566 F.2d at 5–6.
226 NIMMER & NIMMER, *supra* note 147, at § 13.03(A)(2).
227 *Id*.
228 126 F.3d 70, 76–77 (2d Cir. 1997).
229 *See id.* at 72–73.
230 *Id.* at 77.
231 *See* NIMMER & NIMMER, *supra* note 147, at § 13.03(A)(2)(a).
232 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841).
233 17 U.S.C. § 107 (2012).
234 *See id.*

> (4) the effect of the use upon the potential market for or value of the copyrighted work.[235]

The statute provides no guidance on which factors carry more weight than others, an important distinction that could make a difference in how it is applied to choreography cases.[236] This ambiguity has produced what some call "billowing white goo," as lawyers and judges try to make sense of the complicated case law.[237] Additionally, the fair use factors are not exhaustive.[238] The statute and courts indicate that courts can consider other factors not specifically mentioned in the statute, which can also be an important consideration for choreography.[239] Nonetheless, the statute is interpreted to incorporate case law regarding the four factors.[240] Much ink has been spilled trying to determine the most important factors, and courts are undecided on which ones truly hold the most weight.[241] Nonetheless, all four fair use factors must be considered by courts in a fair use analysis.[242]

a. Purpose and Character of Use

The first factor of purpose and character addresses the important consideration that some knowledge and works should be available for public and educational use.[243] An important initial inquiry within this factor is if the copy is for commercial or non-commercial/non-profit use.[244] For choreography, this is an

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235 *See id*.

236 *See* Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1171 (9th Cir. 2012).

237 *See* Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008).

238 *See, e.g.*, 17 U.S.C. § 101; Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 n.10 (5th Cir. 1980).

239 *Triangle Publ'ns, Inc.*, 626 F.2d at 1175 n.10 ("Indeed, the statute indicates that these four factors are not necessarily exhaustive. The factors specified in [section] 107 follow the words 'shall include.' The term 'including' is defined in [section] 101 as 'illustrative and not limitative.'" (quoting 17 U.S.C. § 101)).

240 *See Monge*, 688 F.3d at 1171–83; *Triangle Publ'ns, Inc.*, 626 F.2d at 1175–78.

241 *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PENN. L. REV. 549, 582–83 (2008).

242 *See* 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered *shall* include . . . [listing factors (1)–(4)]." (emphasis added)).

243 *See* LEAFFER, *supra* note 206, at 503–04.

244 *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561–62 (1985).

important distinction because an often-voiced concern in the dance community surrounding copyright law is the potential for dance teachers and small studios to be penalized for teaching and performing well-known works in studio recitals.[245]

Commercial, or for-profit, copyright infringements usually have difficulty in overcoming the first factor.[246] The first factor is typically overcome where there is a benefit for the education of the public.[247] Where the copied work is used for commercial, for-profit purposes, a court is unlikely to find in favor of the defendant on the first factor.[248] Somewhat mitigating this powerful presumption against commercial uses is the good faith and fair dealing standard.[249] The presumption of good faith and fair dealing in a fair use analysis ensures the defendant is given the benefit of the doubt as a court will assume unless proven otherwise that a defendant did not act in bad faith when copying.[250] Consequently, for a finding of fair use on the first factor, a defendant must avoid a showing that they acted in bad faith when copying.[251]

b. Nature of the Copyrighted Work

Fair use encourages the dissemination of information helpful to the public by allowing an affirmative defense for the use of copyrighted information in pursuit of the common good, such as scientific or academic research.[252] The second factor, the nature of the copyrighted work, strives to ensure works of particular value to the public are available.[253] As a result, some types of works, such as out of print books or academic papers, are more susceptible to

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245 *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . ."); Howard E. Goldfluss, *The Judge Is In: ASCAP and BMI vs. Dance Teachers: Understanding How Copyright Laws Affect You*, DANCE TCHR. MAG., Apr. 1999, at 102–03 (April 1999).

246 *See Sony Corp. of Am.*, 464 U.S. at 451 (describing the hurdles faced by commercial use copiers).

247 *See id.*

248 *See id.*

249 *See Harper & Row Publishers, Inc.*, 471 U.S. at 562.

250 *See id.* at 562–63.

251 *See id.*

252 LEAFFER, *supra* note 206, at 505–06.

253 *See id.* at 505.

satisfy the second factor than others.[254] There is a vested interest of society in providing access to factual information, especially works that are potentially not easily accessible, such as out of print books.[255] While much analysis on the second factor centers on published and unpublished books and articles, it is up to the courts to decide if choreography's importance to society warrants easy accessibility to the public.[256] In music, this factor tends to weigh against a finding of fair use.[257]

Currently, no case law hints how this factor should be applied in a choreography claim.[258] However, choreography may be closely compared to music, leading this factor to weigh against a finding of fair use.[259] While choreography can be enriching and studied in great detail, it is not generally deemed a necessary component of society, like scientific research. Its role as cultural entertainment, and not necessarily public information, lowers the need to ensure it is publicly available. As a result, the second factor is unlikely to support a fair use defense.[260]

c. Amount of Similarity

The third factor is confusingly similar to the substantial similarity standard already proven in the infringement copying analysis.[261] The key to the third factor of the fair use analysis is whether the defendant has taken "more than is necessary."[262] As an already difficult standard, the third factor could cause confusion

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254 *Id.*

255 *See id.*

256 *See* LEAFFER, *supra* note 206, at 505–06.

257 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994); *see also* W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443, 444, 449–52 (2015).

258 Neither *Horgan* nor *Bikram*, the two cases that ever came closest, deal directly with fair use. *See generally* Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC, 803 F.3d 1032, 1043–44 (9th Cir. 2015); Horgan v. Macmillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986).

259 *See supra* note 257 and accompanying text.

260 *See supra* note 252 and accompanying text.

261 *See supra* Section II.C.2.

262 LEAFFER, *supra* note 206, at 507.

when applied to choreography.[263] Much like art or music, choreography often intentionally references past works or choreographers.[264] It would be problematic to allow no leeway for this type of referencing, as the point of copyright law is to encourage the creation of new works.[265] That is why fair use allows "a third party . . . to make use of copyrighted works to further its creative endeavors if such use would serve the utilitarian goals of copyright law."[266]

The question becomes, how much is too much? Again, this is uncharted territory for choreography, but the overarching copyright precedent indicates the question must be answered in both a quantitative and qualitative manner.[267] The inquiry will look to see if the copying is verbatim or is getting at the essence of the original work.[268] The court in *Meeropol v. Nizer* quoted Justice Story in *Folsom*, holding that there could be no fair use "if the value of the original is sensibly diminished[,] or the labors of the original author are substantially appropriated."[269] In a leading treatise, the distinction is described as the "'more nuanced' inquiry . . . being

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[263] This has never been applied in a court of law, but dance choreography can only be comprised of so many steps as there are limitations to the movement of the body. While a single dance step, such as an arabesque (where a dancer faces one direction lifting their back leg up with a pointed leg and foot to a ninety-degree angle or higher), *see* Treva Bedinghaus, *What Is an Arabesque in Ballet?*, THOUGHTCO. (Mar. 17, 2017), https://www.thoughtco.com/definition-of-arabesque-1006782 [https://perma.cc/3QHX-PX96], cannot be copyrighted, the line between just a few steps and a choreographic phrase is hard to parse. There are always concerns that single steps will be subject to copyright, which is not the point of the amount of similarity prong. *Cf.* LEAFFER, *supra* note 206, at 507. Deciding where the line is between universally-used dance steps and substantially similar use of copyrighted choreography will need to be a fact-intensive inquiry that only becomes clearer with more case law. *Cf. id.*

[264] For example, the Whipped Cream 'ballet blanc' at the end of Act I in Alexei Ratmansky's *Whipped Cream* (2017) is explicitly referencing the 'ballet blanc' (a scene comprised of women in the corps de ballet dancing in white costumes) of *Giselle*, *Swan Lake*, and *La Sylphide*.

[265] Schuster, *supra* note 257, at 452.

[266] *Id.*

[267] *See* LEAFFER, *supra* note 206, at 508.

[268] *See id.* For an example of a large enough amount of copying to weigh against a finding of fair use, see *Meeropol v. Nizer*, 560 F.2d 1061, 1070–71 (2d Cir. 1977) (holding verbatim inclusion of copyrighted letters, even though one percent of the subsequent text, weighs against a finding of fair use).

[269] *Meeropol*, 560 F.2d at 1070 (quoting Folsom v. Marsh, 9 F. Cas 342, 348 (C.C.D. Mass. 1841)).

'whether the amount taken is reasonable in light of the purpose of the use and the likelihood of market substitution.'"[270] Unless the facts are egregious, the third factor attempts to encourage the building of innovation upon the shoulders of previous works by permitting a limited amount of copying.[271]This predisposition towards innovation will tend toward a finding of fair use for a defendant if the copying is relatively small.[272] Where the copying is limited, the defendant's work is considered a new work and the copied work a jumping off point.[273]

d. Effect on Potential Market

The fourth and final factor weighs the effect the copying has upon the commercial viability in the potential marketplace for the original work.[274] The marketplace for choreography realistically is the ticket-purchasing public who pay to see performances either live or in a recorded form. Courts often consider this fair use factor the most important because of the U.S. Supreme Court's emphasis on it.[275] A court will need to determine if the copying of choreography diminishes its future value.[276] Determining such a fact would be incredibly difficult due to the subjective nature of

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[270] NIMMER & NIMMER, *supra* note 147, at § 13.05(A)(3) (quoting Peter Letterese & Assocs. v. World Inst. of Scientology Enters., 533 F.3d 1287, 1314 n.30 (11th Cir. 2008)).

[271] LEAFFER, *supra* note 206, at 507–08.

[272] *See id.*

[273] *See id.*

[274] *Id.* at 508.

[275] *See, e.g.*, 471 U.S. 539, 562–63 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450–56 (1984).

> In determining whether the use has harmed the work's value or market, courts have focused on whether the infringing use: (1) 'tends to diminish or prejudice the potential sale of [the] work;' or (2) tends to interfere with the marketability of the work; or (3) fulfills the demand for the original work.

Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155–56 (9th Cir. 1986) (first quoting *Meeropol*, 560 F.2d at 1070; then quoting Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741, 747 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir.1980); then quoting Wainwright Secs. Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), *abrogated by* Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010); and then quoting Berlin v. E.C. Publ'ns, Inc., 329 F.2d 541, 545 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964)).

[276] *See* LEAFFER, *supra* note 206, at 508.

any contrived choreography market. Consequently, it is likely a court would be hesitant to make such a factual finding.

III. PROTECTION TODAY

The lack of precedent dealing with choreography makes the application of copyright law challenging for any potential claimants. This Part seeks to provide recommendations to make the statute more effective and highlight the importance of doing so by returning to the two hypothetical lawsuits discussed in Part I. Section III.A details the recommendations to becoming a more effective statute; Section III.B discusses the underlying policy reasons for having a more robust and user-friendly statute; and Section III.C applies the standards established throughout Part II to the hypothetical choreography copyright infringement lawsuits.

A. Becoming a More Effective Statute

Without defined precedent, it is challenging to articulate a clear standard for copyright infringement. However, even with only the analysis of these hypothetical lawsuits, it is clear there are some issues that Congress needs to address to make the law more useful and accessible. Enacting an inclusive definition of choreography and clarifying which fair use factors should carry more weight will make a more usable statute.

1. Defining Choreography

A clearer definition of choreography within the Copyright Act to supplement the designation of "choreographic works" would be the best starting point.[277] A more specific definition of choreography would be helpful, though not completely necessary. If adopting a new definition, Congress should explicitly protect works without a plot or narrative of any kind.[278] A definition of dance should also be limited to works made for performance, which would rule out the inclusion of yoga sequences or aerobic

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[277] *Cf.* 17 U.S.C. § 102(a) (2012).

[278] *Cf.* Fuller v. Bemis, 50 F. 926 (C.C.S.D.N.Y. 1892), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541, 2544–45, *as recognized in* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 340–41 (S.D.N.Y. 2014).

exercises, such as Zumba[279] or Barre[280] class routines as specifically referenced in Circular 52.[281] A potential concern is that the majority of sources a court can rely upon are too narrow.[282] At this point in the development of dance, it is well established that a work does not need to have a plot of any kind.[283] If the Copyright Act cannot include those works in its protection, it may as well not have been enacted at all. Most new choreographic works made today would fall in the plot-less category.[284] Not allowing the statute to extend to more modern works by Balanchine, Graham, Taylor, and others would leave a huge swath of choreographers unprotected who the Copyright Act ostensibly intended to cover. Congress needs to more adequately define the outer limits of what constitutes choreography to avoid the confusion that can easily lead to an unjust outcome.

Such a definition may be along the lines of: Choreography is the compilation of movements, sequences, or physical interpretation assembled for the sake of performance. A plot, narrative element, or accompanying music is not necessary, though often used. Individual steps or sequences and social dance phrases do not in themselves constitute choreography and cannot be copyrighted, but can be used within a larger choreographic work.

This proposed definition draws heavily from Compendium II and *Horgan*,[285] but goes further and considers more abstract works that do not use music and those that have limited, if any, movement. It does not conflict with the only requirement provided in the legislative history, that social dances cannot be

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279 A dance fitness class where people are taught a sequence of dance-like motions by an instructor put to music. *See Learn About Zumba*, ZUMBA, https://www.zumba.com/en-US/about [https://perma.cc/JE3G-P5M8] (last visited Feb. 18, 2018).

280 A ballet inspired workout class. *See* Colleen Travers, *The Beginner's Guide to Barre*, FITNESS MAG., https://www.fitnessmagazine.com/workout/pilates/exercises/barre-beginners-guide/?page=0 [https://perma.cc/67BG-JDSQ] (last visited Feb. 18, 2018).

281 U.S. COPYRIGHT OFFICE, *supra* note 190, at 3–4.

282 *See* discussion *supra* Sections II.A–B.

283 *See supra* Section I.A.

284 *See supra* Section I.A.2.

285 789 F.2d 157, 161 (2d Cir. 1986) (quoting U.S. COPYRIGHT OFFICE, *supra* note 190, §§ 450.01, 450.03(a), 450.06 (1984) (stating the relevant sections of Compendium II the case relies on)).

copyrighted,[286] and would exclude yoga or exercise classes through the definition's requirement of "physical interpretation," in accordance with existing case law.[287]

2. Clarifying Fair Use Factors

It is reasonable to expect defendants to assert fair use defenses when facing choreography copyright infringement claims. Consequently, there needs to be some thought about what factors are most helpful in a choreography context, recognizing it has different concerns than most other works protectable under the Copyright Act. This Note posits that the first and third factors are the most important in an analysis involving choreography.

The first factor is vitally important in light of the prominence of dance schools in the dance community.[288] A significant part of learning to dance most likely includes learning variations of famous choreography to experiment with different styles and techniques. Copyright laws should not prevent this. Putting emphasis on the distinction of non-profit versus commercial use helps ensure that dance studios and dance educational institutions are adequately protected. There is some legislative history that adds weight to this argument. In a House of Representatives Committee Report, there was discussion of emphasizing that the Copyright Act would apply only to commercial dance performances to prevent this very concern of dance teachers suddenly being liable for infringement.[289]

The third factor should also be given more weight.[290] By holding the tenet that substantially similar works are protected, it will encourage choreographers to create more original works.[291] At a time when America is seeking to encourage innovation in intellectual property production, structuring copyright laws to

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286 H.R. REP. NO. 94-1476, at 53–54; S. REP. NO. 94-473, at 52.

287 *See* Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC, 803 F.3d 1032, 1043–44 (9th Cir. 2015); *Horgan*, 789 F.2d at 160–61 (2d Cir. 1986).

288 *See supra* Section II.C.3.a.

289 DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 88TH CONG., 1ST SESS. (H. Comm. Print 1968), at 18.

290 *See supra* Section II.C.3.c.

291 *See* LEAFFER, *supra* note 206, at 507–08.

assist choreographers in exporting choreography and dance benefits national goals.[292] There should also be clearer guidelines about how much overlap constitutes infringement. Choreography inquiries must strike a balance between just enough to understand an inspiration reference, but any more than that would be entering the territory of essence of the original work.[293]

An empirical study by Barton Beebe ("Beebe")[294] determined that the first factor, the purpose and character of use,[295] and the fourth factor, the effect on the potential market,[296] are often considered the most important as they are two sides of the same question.[297] Beebe's study discussed, as said in the U.S. Supreme Court case *Harper & Row*, that the fourth factor correlates with the outcome in the majority of cases, particularly when it correlates to factor one.[298] Choreography is usually performed live by the choreographer's dance company, or a company for which the work was commissioned for.[299] The success of a work is usually measured in ticket sales and numbers of repeat performances. However, most dance companies perform multiple pieces within one performance.[300] It is possible, and perhaps likely, that at least one of the pieces is only successful because it is embedded in a larger program. Additionally, the market initially would be thought

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[292] *See generally* ECONS. & STATISTICS ADMIN. & U.S. PATENT AND TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: 2016 UPDATE (2016) (discussing intellectual property's indispensability to the U.S. economy).

[293] *See supra* Section II.C.2.

[294] Barton Beebe is currently the John M. Desmarais Professor of Intellectual Property Law at New York University Law School. *See Faculty*, N.Y. UNIV. SCH. OF LAW, http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=30077 [https://perma.cc/VT23-PBH2] (last visited Jan. 29, 2018).

[295] *See supra* Section II.C.3.a.

[296] *See supra* Section II.C.3.d.

[297] Beebe, *supra* note 241, at 583.

[298] *See id.*; *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

[299] *See Duties*, Subsection of *What Dancers and Choreographers Do*, Entry in *Occupational Outlook Handbook*, U.S. BUREAU OF LABOR STAT. (Jan. 30, 2018), https://www.bls.gov/ooh/entertainment-and-sports/dancers-and-choreographers.htm#tab-2 [https://perma.cc/W9VT-2JQM].

[300] *See, e.g.*, *Stravisky & Balanchine*, N.Y.C. BALLET, https://www.nycballet.com/Season-Tickets/Winter-2018/Stravinsky-Balanchine.aspx [https://perma.cc/924A-L5YP] (last visited Apr. 30, 2018).

of as people who see dance performances and buy tickets.[301] But, there are so many kinds of dance and choreography that there are even sub-markets within each category—i.e., people who only see Modern companies, or only see the ballet, or are only willing to go to a performance on a proscenium stage, etc.[302] This nebulous definition of the choreography market will add unnecessary complication to the analysis of choreography and the four factors of fair use.[303] Because the first and fourth factors ask similar questions, it is much simpler and workable to focus on the first factor when examining choreographic works.[304]

Fair use preserves the ability to reference and draw inspiration from previous works.[305] When dealing with artistic works, especially something like choreography, fair use is an important mechanism to prevent overprotection.[306] Choreographers should be able to draw inspiration from older works, just as symphonies reference musical elements in previous composers, and visual artists riff on certain subjects or brush patterns. This Note does not advocate for no applicability of a fair use analysis, only the consideration of those aspects that make choreography unique to this issue.

The lack of clarity in these areas most likely holds choreographers back from utilizing the very section of copyright law designed to help them.[307] Codifying a clear definition of choreography will strengthen choreographers' ability to successfully bring copyright infringement suits forward in the event of an incident.[308] Further, with each new case, the standard will be clarified as courts build on one another's interpretations.[309] It will give American choreographers more tools to compete on a

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301 *See Duties*, *supra* note 299.

302 *See id.*

303 *See supra* Sections II.C.3.a, d.

304 *Compare supra* Section II.C.3.a (discussing in the first instance whether copying the work is for profit or nonprofit purposes), *with supra* Section II.C.3.d (discussing whether the copied work is financially damaged by the copying work).

305 *See generally* Folsom v. Marsh, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (espousing the virtues of what would eventually become a fair use doctrine).

306 *See supra* Section II.B.C.3.

307 *See supra* Sections II.A–B.

308 *See supra* Section II.B.

309 *See supra* Sections II.A–B.

global market and export dance more successfully across the world. Dance companies frequently travel the globe, with American companies now traveling overseas instead of the other way around.[310] Solidifying protections for these companies and their choreographers will only continue to establish an American style of dance across the globe. Such strength would herald the days when American works dominated the performance landscape.[311] In times of dwindling American production,[312] looking to the arts to fill some of the export void is a sensible option. A creator's ingenuity is the only limiting factor in the creation of movement.

B. The Benefits and Advantages of Updating the Statute to Assist the Future of Choreography Copyright Infringement Claims

Updating the Copyright Act will assist in making the standard much easier to understand for potential claimants, lawyers, and judges. The choreographic community is at a unique moment of expansion and is inching towards greater access to legal assistance.[313]

Despite the lack of precedent, it is possible that there are choreography lawsuits on the horizon. There are plenty of dance companies and choreographers producing new works in America.[314] There are also new styles, like hip-hop, gaining both

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[310] *See Americans Touring Abroad*, AM. DANCE ABROAD, https://americandanceabroad.org/americans-touring-abroad/ [https://perma.cc/9YPU-CQS7] (last visited Jan. 29, 2018).

[311] *See supra* Section I.A.2.

[312] *See* Heather Long, *The U.S. Has Lost [Five] Million Manufacturing Jobs Since 2000*, CNN MONEY (Mar. 29, 2016, 3:47 PM), http://money.cnn.com/2016/03/29/news/economy/us-manufacturing-jobs/index.html [https://perma.cc/CQL5-PNJR].

[313] *See, e.g.*, *supra* text accompanying notes 187–89.

[314] *See* DANCE/NYC, STATE OF NYC DANCE & WORKFORCE DEMOGRAPHICS 8 (2016), https://www.dance.nyc/uploads/State%20of%20NYC%20Dance%20and%20Workforce%20Demographics%20Online%20Version.pdf. See generally *Contemporary Dance Companies USA*, CONTEMP.-DANCE.ORG, http://www.contemporary-dance.org/contemporary-dance-companies-usa.html [https://perma.cc/TYT2-8YU7] (last visited Feb. 26, 2018); *Directory for Not-for-Profit Dance Ensembles*, DANCE USA, https://danceusa.force.com/DirectoryApi__Directory?autonumber=SD-00000011&site=a0No0000007M73L [https://perma.cc/3JNT-58JW] (last visited Feb. 26, 2018); *Modern/Contemporary Dance Companies*, GAYNOR MINDEN, https://dancer.com/ballet-info/online-resources/moderncontemporary-dance-companies/ [https://perma.cc/C8MD-

popularity and legitimacy, reaching new and larger audiences than ever before.[315] As discussed in Section I.D, the incorporation of "choreographic works" into the Copyright Act was a huge victory for choreographers and members of the dance community.[316]

With the ease of the Internet, choreography continues to evolve.[317] With more dance videos online than ever before, it is easy to accidentally infringe on someone's choreography copyright.[318] This Note is not an appeal for frivolous lawsuits for every YouTube video of high school students who taught themselves the latest *So You Think You Can Dance*[319] piece. However, legal recourse is a tool for professional dance institutions

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3AMC] (last visited Feb. 26, 2018), for lists of registered non-profit dance companies in the United States.

315 *See* Nardine Saad, *Hip-Hop Dance Is Growing in Popularity, Allowing Dance Troupes to Make Money*, WASH. POST (Aug. 9, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/08/08/AR2010080802592.html [https://perma.cc/RL6P-SNAU].

316 *See* Arcomano, *supra* note 19.

317 Some choreographers now create works with film and online video consumption in mind. The orientation of choreography and the detail to which a choreographer will specify their movements has become more intense and precise as it needs to hold up to multiple camera angles. *See, e.g.*, S.F. Ballet, *Justin Peck's 'In the Countenance of Kings' with Music by Sufjan Stevens*, YOUTUBE (Mar. 24, 2016), https://www.youtube.com/watch?v=yMTv_Y0Zrl4; Jevcys, *Roisin Murphy - Ramalama (Bang Bang) HD*, YOUTUBE (Mar. 21, 2010), https://www.youtube.com/watch?v=9RNQ_kl-gBk; Lando Wilkins, *Lando Wilkins || Drake - The Motto*, YOUTUBE (Mar. 4, 2012), https://www.youtube.com/watch?v=QxNOG7BRxnY. Additionally, the Internet has encouraged the rise of site-specific works and performances as they can be recorded and seen online. *See* Hallie Sekoff, *Site-Specific Choreography: When Dances [sic] Goes to Unexpected Places*, HUFFINGTON POST (July 28, 2012, 10:14 AM), https://www.huffingtonpost.com/2012/07/28/site-specific-dance_n_1707315.html [https://perma.cc/8B52-N9NG].

318 *See supra* Section I.C.

319 *So You Think You Can Dance* is a popular reality television dance competition show, now in its fourteenth season. *See* Season Fourteen of *So You Think You Can Dance*, FOX, https://www.fox.com/so-you-think-you-can-dance#season-14 [https://perma.cc/FX4N-NKVU] (last visited Jan. 30, 2018). Competitors learn a new set of choreography each week, which they perform for the judges and the viewing audience. *Cf. About the Show*, Section of *So You Think You Can Dance*, FOX, https://www.fox.com/so-you-think-you-can-dance/article/about-the-show-597bbdd0ef528f0026dc030c/ (last visited Apr. 30, 2018). The audience then votes on their favorite dancers. *See id.* On the following episode, the dancers with the fewest votes are given the chance to dance for their life before the judges, or make a decision about who to cut until the season finale, where the dancer with the most votes wins the title Americas Favorite Dancer and a cash prize or marketing contract. *See generally id.*

and choreographers. Using the Copyright Act as intended to protect choreographic works[320] will deter infringement in the future and make it easier for future choreographers to understand their legal rights.

Through its long history, choreography has morphed into an internationally recognized art form.[321] This Note urges choreographers to take advantage of their legal rights among other artists and creators under modern Copyright Law. This Note seeks to serve as a springboard for any future choreography copyright infringement lawsuits to assist the dance community in asserting said rights.

C. Application of Law to Facts—How Would De Keersmaeker and Graham Fare?

After the detailed exploration of how a choreography copyright infringement claim would proceed, it is necessary to apply the clarified standards to fact patterns to understand how they interact with factual situations. This Section applies copyright law, as it pertains to choreographic works, to the De Keersmaeker situation and Graham hypothetical.

1. *De Keersmaeker v. Beyoncé*

In an action by De Keersmaeker against Beyoncé, it is likely De Keersmaeker would be successful. De Keersmaeker has fulfilled the threshold matter of "fixation" by filming her work.[322] Following this Note's proposed definition of choreography, De Keersmaeker's work is a "compilation of movements, sequences, or physical interpretation put together for the sake of performance" set to music, without a narrative plot.[323] The only definitions that would preclude finding De Keersmaeker's work as choreography come from pre-1976 case law and potentially from the Varmer Study's implied acceptance of a "dramatic" requirement.[324] As pre-

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320 *See* 17 U.S.C. § 102(a) (2012).

321 *See supra* note 116 and accompanying text (quoting an apt description of its rise by a regarded scholar in the field).

322 *See supra* note 125; *see also* 17 U.S.C. § 102(a) (requiring fixation of works for copyrightability).

323 *See supra* note 119 and Section III.A.1.

324 *See supra* notes 175–79 and accompanying text.

1976 case law determined, "dramatic works" required an element of narrative or plot.[325] De Keersmaeker's works, while containing an emotional and intellectual depth, do not have a plot or narrative device.[326] However, the few cases that have examined this issue seemed disinclined to continue the outdated requirement of narrative.[327]

Once confirming that De Keersmaeker's work falls under protected "choreographic works," De Keersmaeker may be able to prove direct copying. Beyoncé had the opportunity to see De Keersmaeker's work as it was publicly available on video.[328] Additionally, evidence suggests her choreographer for the "Countdown" video showed her De Keersmaeker's films and they decided to base the choreography off of them.[329] Direct Copying requires the copier to have had the plausible opportunity to see the original work, and here Beyoncé is quoted as saying she saw De Keersmaeker's work and was inspired.[330]

Even if a court does not find direct copying, De Keersmaeker is likely to prove substantial similarity. Under comprehensive nonliteral similarity, De Keersmaeker may show substantial similarity because the choreography looked so similar that viewers picked up on it.[331] Furthermore, the fragmented literal similarity

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325 *See supra* notes 57–71 and accompanying text.

326 *See* Lise Smith, *Review: Anne Teresa De Keersmaeker's Rosas in Early Works at Sadler's Wells*, LONDONDANCE (Apr. 11, 2011), http://londondance.com/articles/reviews/early-works-at-sadlers-wells-3667/ [https://perma.cc/36ZZ-K2U9]; *see also* Anna Teresa De Keersmaeker, *Rosas Danst Rosas* (1983); Anna Teresa De Keersmaeker, *Achterland* (1994).

327 *See* Bikram's Yoga Coll. of India, L.P. v. Evolution Yoga, LLC, 803 F.3d 1032, 1042–44 (9th Cir. 2015) (holding that yoga sequences go too far, while hinting that movement in a more performative role, not a health role, would be acceptable as choreography); Horgan v. MacMillan, Inc., 789 F.2d 157, 161–62 (2d Cir. 1986) (originating the more expansive definition in case law, explicitly leaving room for more abstract choreography).

328 *See supra* note 125 and accompanying text.

329 *See* Mckinley Jr., *supra* note 124 ("Clearly, the ballet 'Rosas danst Rosas' was one of many references for my video 'Countdown.' It was one of the inspirations used to bring the feel and look of the song to life." (quoting Beyoncé)).

330 *See id*.

331 *See supra* notes 217, 221–25 and accompanying text.

test is much more likely to succeed.[332] There were small segments taken from De Keersmaeker's work that in sum make it clear where they came from.[333] For comparison to a medium more frequently litigated, courts can consider music and digital sampling.[334] If choreography is similar to music, it must be more than a phrase that is copied.[335] While one may compare choreography infringement to digital sampling,[336] there is no obligation to do so. Even if a court insists on comparing choreography infringement to digital sampling, the amount of change from the original work to the copied work in the Beyoncé and De Keersmaeker example is much more substantial than the changes found in cases like *Bridgeport Music, Inc. v. Dimension Films*.[337] Section 114(b) of the Copyright Act, which *Bridgeport Music, Inc.* relies upon, creates exceptions to copyright infringement claims when it is considered digital sampling.[338] However, section 114(b) of the Copyright Act explicitly refers to audio recordings.[339] Choreography is not eligible for the sort of

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[332] *See generally supra* notes 217, 226–31 and accompanying text (discussing the fragmented literal similarity test).

[333] *See supra* note 219 and accompanying text.

[334] *Sampling*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("The process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording.").

[335] *Cf.* Brodsky v. Universal Pictures Co., 149 F.2d 600, 600–01 (2d Cir. 1945).

[336] *See supra* note 334.

[337] 410 F.3d 792, 796–98, 800–01 (6th Cir. 2005) (finding two notes changed in pitch and looped multiple times throughout a song does not rise to copyright).

[338] *Id.* at 800 (citing 17 U.S.C. § 114(b) (2000)).

[339] Title 17 of the U.S. Code provides:

> The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 [17 U.S.C. § 106] is limited to the right to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not

analysis deployed in *Bridgeport* because it is not included in that section of the statute.[340] Therefore, any importation of analysis used in digital sampling cases should be irrelevant to a choreography copyright infringement analysis.

De Keersmaeker can also overcome the assertion of a fair use defense if Beyoncé asserts one. Addressing the first factor of purpose and character, Beyoncé is using the infringement for a commercial use.[341] Even stronger in De Keersmaeker's favor, there are statements from Beyoncé acknowledging that she knew she was copying De Keersmaeker's work, which demonstrates bad faith copying.[342]

The second factor regarding the nature of the work does not lend itself to a finding of fair use. The nature of the work factor typically works to provide access to works useful for society at large.[343] While a beautiful and inspiring art form, choreography that has been preserved in a fixed manner does not need a lowered level of protection to ensure access for the public as a rare manuscript might.[344] De Keersmaeker's work, frequently performed and well documented, does not run the risk of fading into obscurity and is largely for entertainment.[345]

> apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47 [47 U.S.C. § 397 (2012)]) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f) [17 U.S.C. § 118(f)]): *Provided*, that copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

17 U.S.C. § 114(b) (emphasis in original).

340 *See id.*

341 While Beyoncé is not charging money for the music video the way tickets are sold for a dance performance, the purpose of the music video is to promote the song to raise purchases of the song. The use of choreography in pursuit of revenue, as opposed to the use in a children's dance school to showcase the students to their parents, gives the use a commercial nature.

342 *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561–62 (1985); Mckinley Jr., *supra* note 124 (quoting Beyoncé admitting that she misappropriated De Keersmaeker's works for her music video, which was a for-profit venture).

343 *See supra* Section II.C.3.b.

344 *See supra* Section II.C.3.b.

345 *See, e.g.*, *Early Works – Films and Documentaries*, ROSAS, http://www.rosas.be/en/publications/309-early-works—-films-and-documentaries [https://perma.cc/YYE4-

The third factor of amount and substantiality of the work is the most challenging factor to deal with from De Keersmaeker's perspective. However, the roughly one-and-a-half minutes of Beyoncé's three minute music video are filled with De Keersmaeker's choreography from both *Rosas danst Rosas* and *Achterland*.[346] A court would likely consider this a substantial portion, particularly compared to the small percentage needed in other cases.[347] Additionally, the portions of choreography were recognizable enough that people who watched the music video without any sort of citation to De Keersmaeker's work were able to notice the similarities.[348]

Regarding the fourth and final factor of effect on the market,[349] it is possible to argue that Beyoncé made the work more notable and actually increased its marketability. While not untrue, De Keersmaeker sells to a different market, which the infringement could adversely affect. De Keersmaeker caters to a dance performance market where patrons expect works that challenge their assumptions on art and dance.[350] Beyoncé caters to the mass market on television and packed tours with thousands of audience members at regular venues.[351] De Keersmaeker's work is known for being experimental and daring.[352] If she is perceived as mainstream or pop culture she may alienate her audiences. Therefore, factor four is probably the strongest factor supporting Beyoncé's fair use defense.

Weighing all the factors equally, De Keersmaeker would likely succeed on an infringement claim. Even weighing the first and

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H7GW] (last visited Feb. 18, 2018); ROSAS, http://www.rosas.be/en/ [https://perma.cc/5YPV-393L] (last visited Feb. 18, 2018).

346 *See* KRAUT, *supra* note 7, at 267–68; fundifferent1, *supra* note 123 (containing a YouTube video depicting Beyoncé's music video side-by-side De Keersmaeker's works).

347 *See supra* notes 227–31, 268 and accompanying text.

348 *See, e.g.*, Mckinley Jr., *supra* note 124; fundifferent1, *supra* note 123.

349 *See supra* Section II.C.3.d.

350 *See* KRAUT, *supra* note 7, at 266, 268.

351 *See* Ray Waddell, *Beyonce's Formation Tour Sold Over [Two] Million Tickets and Made Over $250 Million*, BILLBOARD (Oct. 14, 2016), https://www.billboard.com/articles/business/7541993/beyonce-formation-tour-2-million-tickets-250-million-dollars [https://perma.cc/SVB3-JCTR].

352 *See supra* Section I.B.

fourth factors most heavily as case law sometimes suggests,[353] De Keersmaeker would also be likely to win. It is also possible that courts would view the fourth factor as the most persuasive, but that would mean ignoring the long struggle articulated in Section I.D.[354] While choreographers undoubtedly hope to be paid for their work, it has rarely been a cash cow for the choreographers themselves.[355] Placing all the emphasis on the fourth factor would negate the other purposes and interests of choreographers to have protection at all.

Taking all this into consideration, in a hypothetical lawsuit, De Keersmaeker has a strong case to prove copyright infringement. As choreographers push the envelope in the boundaries of dance, it is encouraging to consider the possibility that they can prevail in an infringement action.

2. *Graham v. Taylor*

If Graham sued Taylor for infringement, Graham would likely be unsuccessful. Graham's works would pass the initial hurdle of fixation, as most of her works are either recorded or notated.[356] However, her technique of contract and release and spiral is likely to be seen as an 'idea' and not an 'expression' for purposes of copyright protection.[357] This is similar to *Bikram's Yoga College of India, L.P. v. Evolution Yoga, LLC*,[358] where the court held that yoga sequences were not copyrightable choreography because they

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353 *See supra* notes 294–98 and accompanying text.

354 *See supra* note 275 and accompanying text.

355 *See* Jay MacDonald, *Think You Can Dance for a Career? Think Again*, BANKRATE (Oct. 24, 2006), https://www.bankrate.com/finance/jobs-careers/think-you-can-dance-for-a-career-think-again.aspx [https://perma.cc/9ZF4-GEN3] ("Choreographers and dance instructors . . . earn[] an average [of] $33,670 and $34,090 respectively.").

356 *See generally* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, 380 F.3d 624, 628–30 (2d Cir. 2004) (discussing a dispute over Graham's works, thirty of which were registered for copyright, and "numerous properties—books, musical scores, films and tapes of performances and rehearsals of dances, and business and personnel files relating to Graham's work—to [be sold] the Library of Congress for $500,000").

357 This idea-expression dichotomy ensures that innovation can occur, as "[i]deas are raw materials that serve as building blocks for creativity." NIMMER & NIMMER, *supra* note 147, § 19E.04(B).

358 803 F.3d 1032 (9th Cir. 2015).

were characterized as a health system.[359] While possibly inspired by Graham and learned from her, Taylor's use of contract and release and spiraling does not constitute an infringement because they are likely uncopyrightable subject matter.[360] This may seem anticlimactic as a result, but the easy dismissal of an infringement claim under the Copyright Act ensures the statute is being used as drafted.[361]

This is an important gate within the Copyright Act to avoid the concerns raised by the dance choreographer community.[362] There is a physical limit to the different movements choreographers can invent for the human body to perform. If protection were to extend to a style such as Graham's technique or all the way down to a single movement like an arabesque,[363] choreographers would not be able to create new works without the risk of copyright infringement. Under the language of the statute, it seems very unlikely something like Graham's technique would be held copyrightable,[364] laying fears to rest that over-protection will prevent innovation and development of the choreographic form.

CONCLUSION

Choreographers create and perform an increasing number of works across the United States and abroad. As dance permeates the collective cultural landscape, current legal framework for copyright protection of choreography may find itself tested. The existing protection from the Copyright Act of 1976 was a momentous occasion for the success and legitimacy of choreography as an American art form. However, its lack of a definition and minimal case law leaves gaping questions for any future litigants. For better protection of choreography, Congress should tighten up the statute by providing a more concrete definition that does not require a narrative or plot element to

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359 *Id.* at 1042–44.

360 *See* 17 U.S.C. § 102(b) (2012).

361 *See supra* notes 147–51 and accompanying text.

362 *See generally* SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS OF THE COMM. ON THE JUDICIARY, *supra* note 117, at 105–16.

363 *See supra* note 263 and accompanying text.

364 *See* 17 U.S.C. § 102(b).

ensure the greatest American choreographers and their progeny are adequately protected. Additionally, courts need to clarify how fair use analysis would affect choreography infringement claims. These areas, as well as greater access to the courts and legal system, will allow better protection of choreography and enhance America's position as a main creator of dance.