THE PAS DE DEUX BETWEEN DANCE AND LAW
Tossing Copyright Law into the Wings
And Bringing Dance Custom Centerstage

By Katie Lula*

Introduction

In 1980, when a fundraiser with the best of intentions told modern dance choreographer, Martha Graham “Miss Graham, the most powerful thing you have going for you to raise money is your respectability,” Graham wanted to spit. “Respectable!” she replied. “Show me any artist who wants to be respectable.”1 Dance epitomizes beauty, grace, and skill, yet is often considered the “black sheep” of the performing arts.2 Outside of New York City, audiences tend to be scarce for choreographers and dance companies.3 Those who manage to find an audience usually see their profits consumed by the costs of mounting a production.4 As a result, most choreographers and dancers are seriously underpaid5 compared to accountants, actuaries, and software engineers.6 Even governments drastically cut budgets for subsidized dance.7

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1 Lauren B. Cramer, Copyright Protection for Choreography: Can it ever be 'En Pointe'? Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography, 1 SYRACUSE J. LEGIS. & POL. 145, 159 (1995) (citations omitted).

2 This essay distinguishes between dance as an art, such as Twyla Tharp’s Push Comes to Shove, and dance as an element of popular entertainment — for instance, an MTV rap music video. Tharp’s Push Comes to Shove is different from the dance in an MTV rap music video because the social forces shaping Tharp’s choreography are different from the social forces shaping the video’s choreography. The primary force of Tharp’s choreography is dance, whereas the primary force of the MTV video is any element but dance: the music, the lyrics, even the rapper himself. For that reason alone, in this essay, Tharp’s choreography is considered to be dance, and the choreography in the MTV rap music video is not. See GRAHAM MCFEE, UNDERSTANDING DANCE 290 (1992).


4 See id. at 291.

5 See id.

6 See id.

7 See The Wall Street Journal CareerJournal.com, We Ask: What Are Some of the Best and Worst Jobs? CAREERJOURNAL, June 14, 2005, http://www.careerjournal.com/salaryhiring/hotissues/20050614-intro1.html?cpos=home_bricks. Based on factors such as income, stress, physical demands, outlook, security, and work environment, some of the best professions are accountants, actuaries, bank officers, biologists, computer-systems analysts, financial planners, parole officers, software engineers, statisticians, and website managers. Some of the worst jobs are a construction worker, a cowboy, a dancer, a fisherman, a garbage collector, an ironworker, a lumberjack, a roofer, a seaman, and a welder.

8 See David Willey, Italy Facing Opera Funding Crisis, BBC NEWS, Oct. 27, 2005, http://news.bbc.co.uk/go/pr/fr/-/hi/entertainment/arts/4381128.stm. Italy plans to cut its 2006 funding for the performing arts by 35%. As a result, Italy’s thirteen opera houses—which keep musicians, members of the chorus, and ballet dancers on permanent staff—could be forced to curtail their programs or even shut down because they are heavily subsidized by
A choreographer’s most valuable assets are the dances he or she creates.9 A dance primarily defines a choreographer.10 Because financial success is rare, the choreographer is interested mostly in recognition and preservation, not in monetary rewards.11 Some choreographers are solely concerned about recognition. When asked about preserving his dances for future dance companies and audiences, George Balanchine, the first great ballet choreographer in the United States, emphasized, “Now is when [the dances are] beautiful.”12 To Balanchine, preserving dances meant that future dancers and audiences “will remember [only] the steps and forget the idea” underlying each dance.13 The primary value of a dance is not who choreographed the dance but rather the movement that it contributes to the art of dance as a whole and to the world at large.

Dance is about art, not about business.14 Eliot Feld, choreographer and Balanchine protégé, once commented selflessly, “I wish people were stealing my [dances] left and right.”15 Thus in some cases, if choreographers lose “the ability to receive credit for their hard work,” as some legal scholars contend, artistic incentive to create dances in the future will not be reduced.16 Some lawmakers and lawyers believe that legal recognition is essential to the preservation of choreographic rights17 and perhaps indirectly to the preservation of dance itself as an art. However, the “second-class status”18 of dance unfortunately extends to the legal arena. Due to certain incompatibilities between the 1976 Copyright Act and dance, choreographers hesitate to copyright their dances.19 They remain satisfied simply with the recognition they receive from their peers, trusting the traditional culture of their dance community, which is one in which strong respect exists between professional artists.20

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10 Id.
11 Id.
13 See id. at 268.
14 But see id. at 40.
16 But see Abitabile, supra note 9, at 53. Copyright law operates on this presumption:

Information can be of great value as well as costly to produce, and without a legal regime protecting certain informational products, [authors] would not produce the optimal amount of information for the public welfare... The creator who cannot recoup his [or her] investment will not create. Thus, if the author cannot exclude others from his [or her] work, the result will be either non-production or non-disclosure... [C]opyright law represents an economic trade-off between optimal creation of works of authorship and their optimal use.

17 Singer, supra note 3, at 307.
18 Id. at 291.
19 See Abitabile, supra note 9, at 58.
20 But see id. at 59.

5 Chi.-Kent J. Intell. Prop. 178
However, it is also wrong for the dance community to assume legal recognition of a choreographer’s rights is not important. Dance choreographers should take strides to preserve their culture, and should do so by gaining legal recognition and copyright protection for their dances. Just as various people throughout history and across the world struggle for equal human and civil rights, dance choreographers deserve legal recognition and copyright protection as adequate and effective as that given not only to other performing arts but also to every form of artistic and literary work recognized and protected by the 1976 Copyright Act.

To reflect this belligerent pas de deux between dance and law, I have divided this essay into three main acts (or sections) interspersed with inspirational quotations from THE RED SHOES, a beautiful movie about dance. In Act I, I discuss the 1976 Copyright Act and its insufficiencies as applied to dance choreography. I also analyze Horgan v. Macmillan, Inc., which discussed but ultimately failed to resolve dance choreography copyright issues. In Act II, I discuss current dance custom and its effectiveness in handling copyright issues independent of the government. I present the George Balanchine Trust as an ideal model of how to conform legal practices to dance custom. In Act III, I analyze two major insufficiencies of the 1976 Copyright Act: first, an inadequate definition of dance choreography, and second, a requirement that dance be “fixed in a tangible medium.”

To correct these insufficiencies, I propose amendments to the 1976 Copyright Act to codify custom and to subsidize dance. Because of its inherent nature, dance cannot and should not conform to the limiting legal standards currently imposed by the 1976 Act; rather, the Act should expand to conform to dance. We must redesign federal statutory law to reflect the traditional practice, standards, and concerns of the dance community.

I. The Legal Arena of the 1976 Copyright Act

The 1976 Copyright Act (the “Act”) provides copyright protection in original works of authorship fixed in any tangible medium of expression, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Theoretically, works of authorship include dance choreography. The Act also provides copyright holders with certain economic rights: (1) the right to reproduce the copyrighted work, (2) the right to prepare derivative works based upon the copyrighted work, (3) the right to distribute copies of the copyrighted work to the public, (4) the right to perform the copyrighted work publicly, and (5) the right to display the copyrighted work publicly.

The Act can protect all five economic rights in dance choreography, so long as the dance is copyrightable and, in the same breath, copyrighted. First, when a choreographer

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21  See id.
22  In ballet, a pas de deux is a “dance for two.” GAIL GRANT, TECHNICAL MANUAL AND DICTIONARY OF CLASSICAL BALLET 80 (3d ed. 1982). My favorite pas de deux is from Sergei Prokofiev’s ballet, Romeo and Juliet.
23  See Cramer, supra note 1, at 160.
24  See id.
28  Swack, supra note 12, at 282.
exercises his or her right to reproduce a dance, he or she can restage the dance; conversely, he or she can also stop any unauthorized performances. Second, under the right to prepare a derivative dance, a choreographer may create his own version of a traditional classical ballet preexistent in the public domain—that is, a ballet having no copyright protection itself—and may receive copyright protection for his added original expression if it is substantially based on the preexisting ballet but is more than a trivial variation. The choreographer may also specially choreograph to a specific musical score or sound recording and receive protection. Because the choreography would be of the choreographer’s auditory response to the music, the dance would be both a distinguishable variation of, and substantially based on, the preexisting music.

Third, under the right to distribute copies, a choreographer may control audiovisual publication and distribution of a dance against all others. This includes protection against those who may remember and thus reconstruct his dances. Fourth, under the right to perform, a choreographer or a licensing agency, like The George Balanchine Trust, can license the performance rights in a dance to other dance companies in exchange for royalty fees. Fifth and finally, the right to display protects original dances filmed, broadcast, or transmitted through the cinema, cable, or television, as well as any theatrical reproductions.

Like most unpublished works, such as a travel journal kept in a drawer for the author’s private recollection and enjoyment, dance choreography is theoretically protected at the time of creation, but such protection is essentially ineffective: the choreographer can only collect special or statutory damages in the United States if—he or she has acquired official and legal copyright protection from the United States Copyright Office under the Act. The Act recognizes and protects dance choreography as copyrighted only if it fulfills three requirements. First, it must qualify as a “choreographic work.” Second, it must be “original.” Third, it must be fixed in some tangible medium of expression.

Although the Act protects dance in theory, these requirements make it difficult for most choreographers to acquire and in most cases even to seek copyright protection. In 1980, only sixty-three of the 464,743 registered copyrighted works were choreographic works. After 1982, when only 132 of the 468,149 registered copyrighted works were choreographic works, the Copyright Office ceased publishing in its annual report the number of choreographic works registered. Instead, they group it within the number of general performing art works registered.

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29 See id.
30 See id. at 283.
31 See id.
32 See id.
33 See id.
34 See id. at 284.
35 See Abitabile, supra note 9, at 44-45.
36 Cramer, supra note 1, at 147.
37 Id.
39 Abitabile, supra note 9, at 56.
In 2004, therefore, it may be safe to assume that significantly less than 170,512 of the 661,469 registered copyrighted works were purely choreographic works.41

A. What is Choreography?

LERMONTOV: How would you define ballet, Lady Neston?

LADY NESTON: Well, one might call it the poetry of motion perhaps, or…

LERMONTOV: One might. But for me it is a great deal more. For me it is a religion.

And one doesn’t really care to see one’s religion practiced in an atmosphere…such as this.42

The Act provides for registration of a dance if it qualifies as a “choreographic work,” but problems arise because the Act does not adequately define the phrase “choreographic work.”43 Legislative history and case law suggest a definition far narrower and stricter than that customarily followed by dance choreographers themselves.44 The Copyright Office defines choreography as “the composition and arrangement of dance movements and patterns usually intended to be accompanied by music.”45 Choreography may also “represent a related series of dance movements and patterns organized into a coherent whole.”46 Social dance steps, folk dance steps, and individual ballet steps may be incorporated as the choreographer’s basic material in much the same way that words are the writer’s basic material.47 However, when such “simple routines” are generally excluded as too common or basic to merit copyright protection, the Act sets an arbitrary minimum level of difficulty, which consequently denies registration to very simple or highly innovative dances.48

Other unsettled questions include whether incorporation of social dances is completely eliminated, which kinds of abstract movement will be considered choreography, and whether storylines are still required.49 Choreography need not tell a story or be presented before an audience to acquire federal copyright protection,50 yet case law suggests that dance choreography might indeed still require some notion of a storyline to acquire protection, a suggestion which adversely threatens creative and groundbreaking dances.51 Many of today’s choreographers focus merely on movement, despite legislative history that suggests the Act was not intended to protect movement alone.52


42 THE RED SHOES (Independent Producers 1948).

43 See Singer, supra note 3, at 297.

44 Id.

45 Swack, supra note 12, at 276.

46 Id. at 276-77.

47 See id. at 277.

48 See Singer, supra note 3, at 297-98.

49 See Lopez de Quintana, supra note 38, at 153.

50 See Swack, supra note 12, at 276.

51 See Lopez de Quintana, supra note 38, at 153.

52 Id. at 153-54.
Dances within the legal definition of “choreography” must also be “original” in order to qualify for statutory copyright protection. Although the common meaning of “original” can be “novel” or “unusual,” statutorily the term signifies that a dance must have its origin in the skill, labor, or judgment of its choreographer. Courts have not yet determined the level of originality required for choreographic works to qualify for copyright protection, leaving this significant aspect of the legal definition of dance choreography unresolved.

B. (In)Tangibility

Choreography which is only publicly performed, and therefore not published, would remain protected by state copyright law until the choreographer “fixed” the work in a “tangible form of expression,” which may be accomplished either by notating or audiovisually recording the dance. Conversely, federal courts hold that regardless of the number of times a dance has been publicly performed, it is considered a choreographic work and therefore protected under the Act only when it is fixed in a tangible copy for the first time. This differs from the travel journal, which is “fixed” the moment the pen scratches the page. This also poses another problem for choreographers. While the fee for registering a copyright stands at a modest thirty dollars, the choreographer, unlike his or her counterparts in literature and art, who need buy only a pen and paper, or a brush, paint, and canvas, must expend an arguably impractical amount of additional funds in order to comply with the fixation requirement — funds that the choreographer likely or normally does not have.

The Copyright Act requires that choreography be fixed in some tangible medium before acquiring federal copyright protection. Whereas literary works are already inherently fixed in books, or movies in film, dance is, in essence, an intangible art that lives primarily through performance instead of through recordation. This fixation requirement created a formidable obstacle for choreographers seeking legal protection. The two methods which are historically and most commonly used to this day for the fixation of dance are notation and audiovisual technology. However, choreographers find neither method satisfactory.

1. Formal Notation

Formal notation is a form of writing that often uses abstract symbols to record a dance. The best advantage about formal notation is that it is thorough. While recording a dance, the annotator is present at key rehearsals, notating not only steps but also the imagery, motivation,
and characterization given to the dancers by the choreographer.\textsuperscript{64} The Dance Notation Bureau (DNB) is a non-profit organization that strives to advance the art of dance through the use of formal notation systems, primarily Labanotation.\textsuperscript{65} The DNB collects and catalogs dance notation in a multi-media format, adding a full range of materials along with the notated score to ensure complete documentation.\textsuperscript{66} Much like bonus documentary materials on extended edition DVDs, the DNB gathers together videotaped records of specific performances, music tapes and marked music scores, production information such as costume, set, and light designs, and historical information.\textsuperscript{67}

However, almost all choreographers compose and use their own notes for their dance choreography rather than formal notation, which is a difficult and little-known language requiring the services of a specially trained expert.\textsuperscript{68} Since the mid-fifteenth century, approximately eighty-eight formal notation systems have existed in the world, with sixty-six of them created in the twentieth century.\textsuperscript{69} Since 1928, a new notation system appears approximately every four years.\textsuperscript{70} It is unlikely that one system will ever preside over all others\textsuperscript{71} because different members of the dance community desire different aims of a notation system. Some members want a simple memory-aid, while others seek great detail. Some best respond visually and favor a pictorial representation, while others are interested only in the “inner workings” of a dance style and desire an almost mathematical precision.\textsuperscript{72} People who have no knowledge of dance notation systems — such as some lawyers and judges — have no way of judging which system is best, or which system would best suit them.\textsuperscript{73}

Notation may not be a dying art form,\textsuperscript{74} but professionals in notation are rare and expensive, typically charging $1,200 to $1,400 for roughly twenty minutes of a dance.\textsuperscript{75} Furthermore, although notation can reflect the most subtle nuances of movement, it does not capture style or individual interpretation.\textsuperscript{76} Because some notation is not readily visual — it must be painstakingly interpreted before it may be danced — it is not always a convenient rehearsal or reconstruction tool.\textsuperscript{77} Consequently, many choreographers do not record their dances in formal notation.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{65} Dance Notation Bureau, About the DNB: Preserving the Past, Enriching the Present, Securing the Future, http://dancenotation.org/DNB/ (last visited Oct. 15, 2005).
\item \textsuperscript{66} Dance Notation Bureau, supra note 64.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} See id. at 301-02.
\item \textsuperscript{69} See ANN HUTCHINSON GUEST, CHOREO-GRAFICS: A COMPARISON OF DANCE NOTATION SYSTEMS FROM THE FIFTEENTH CENTURY TO THE PRESENT 183-84 app. A (1989).
\item \textsuperscript{70} Id. at 182.
\item \textsuperscript{71} Id. at 181.
\item \textsuperscript{72} See id.
\item \textsuperscript{73} See id. at 182.
\item \textsuperscript{74} But see Lopez de Quintana, supra note 38, at 159.
\item \textsuperscript{75} See id.
\item \textsuperscript{76} Singer, supra note 3, at 302.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} See id.
\end{itemize}
2. Audiovisual Technology

Audiovisual technology is less expensive than notation but has limited capabilities. Film offers only moving images, which are not very useful to the choreographer or reconstructor wishing to observe isolated movements. Because of the distortion and foreshortening of space, film also cannot properly convey the three-dimensional nature of dance, and unless shot from the back instead of from the audience’s point of view, it provides a mirror image of the dance that reverses left and right. Peter Martins, Ballet Master of New York City Ballet, described the inadequacy of using film to record dance: “There is no space...When you make a dance for the stage, you work with a straight line, a circle, a semicircle, a diagonal. There are the options. On [film], these options become totally distorted.” Thus, some choreographers pass on visual fixation for recording dance.

C. No Justice for Dance

The most notable case brought to federal court under the 1976 Copyright Act came in 1986: Horgan v. Macmillan, Inc. Horgan asked the novel question whether still photographs of the New York City Ballet Company's production of George Balanchine’s “Nutcracker Ballet” constituted infringement of copyright in the dance choreography, either as copies of the original dance or as derivative works. The district court found no copyright infringement, holding that the photographs were simply pictures of dancers, which could not enable Balanchine’s version of “The Nutcracker” to be reproduced as a ballet. The judge stated, “The still photographs...do not, nor do they intend to, take or use the underlying choreography. The staged performance could not be recreated from them...”

The Second Circuit, however, reversed and remanded the district court’s decision. It held that a “snapshot of a single moment in a dance sequence may communicate a great deal” and that an ordinary observer could perceive much more than a mere gesture or position. The defendant photographers argued that “The Nutcracker” ballet was “created for movement...[and that] no one would mistake an inanimate photograph of a balletic scene for the fluid, vibrant movement of a ballet performance,” the Second Circuit stood firm. It held that copyright infringement could exist in the form of photographs and remanded the case back to the

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79 See id. at 302-03.
80 Id. at 303.
81 See id.
82 Cramer, supra note 1, at 150 (citations omitted).
83 See Singer, supra note 3, at 303.
84 789 F.2d 157 (2d Cir. 1986). A more recent case, Martha Graham School and Dance Foundation v. Martha Graham Center of Contemporary Dance, is equally notable but deals with “whether the work-for-hire doctrine applies to works created by the principal employee of a corporation that was...created to serve the creative endeavors of an artistic genius.” See 380 F.3d 624, 628 (2d Cir. 2004). This is a dance choreography copyright issue not within the relevant scope of this essay.
85 See Cramer, supra note 1, at 151.
86 Abitabile, supra note 9, at 46.
87 Id. (citations omitted).
88 See id. at 47.
89 Id. (citations omitted).
90 Id. (citations omitted).
district court to decide whether Balanchine’s copyright protection had been breached. The issues left for the district court to determine included the validity of Balanchine’s copyright, the amount of original Balanchine choreography in the New York City Ballet’s production of The Nutcracker and in the photographs, and the degree to which the choreography would be distinguishable in the photographs without the costumes and sets.

Based on the Second Circuit’s (mis)treatment of dance choreography and copyright law, Horgan proves two points. First, Horgan assumes choreographers gain such a wealth of information about a specific dance or performance from a mere photograph, that they may recreate the exact, entire choreography. The court believed that a photograph could reveal not only a key moment in a dance, such as a gesture, the composition of dancers’ bodies, or the placement of dancers on stage, but also the moments before and after the split second photographed:

…[T]here is a two-page photograph of the “Sugar Canes,” one of the troupes that perform in The Nutcracker. In this photograph, the Sugar Canes are a foot or more off the ground, holding large hoops above their heads. One member of the ensemble is jumping through a hoop, which is held extended in front of the dancer. The dancer’s legs are thrust forward, parallel to the stage and several feet off the ground. The viewer understands instinctively, based simply on the laws of gravity, that the Sugar Canes jumped up from the floor only a moment earlier, and came down shortly after the photographed moment.

This line of reasoning is, frankly, ridiculous — especially from the point of view of someone trained and well-skilled in ballet. Of course, the Sugar Canes jumped up from the floor and probably came down shortly thereafter, but the question is, how? On one leg, or two? With their feet turned out or parallel, flexed or pointed? Which way were their torsos angled? Did they still hold the hoops, and if so, with one hand or two? In front of themselves, or above their heads? There are a variety of possibilities, and a single photograph of a jump caught mid-air, while narrowing by the configuration of the dancer’s body which possibilities may be more likely, cannot precisely determine the rest of the dance. It would be like trying to predict the rest of a sentence by singling out the word “be,” or forecasting the rest of the week based on a bad day. Nor can a single photograph be sufficient evidence alone to prove copyright infringement. Unless a choreographer has personally learned or performed the dance pictured, or unless he or she has seen it and has a photographic memory, an entire dance cannot be exactly recreated from a single photograph.

This leads to the second point of Horgan: a judge or a court cannot be responsible for deciding how a work can or cannot be recreated. Only a dancer or choreographer, someone well-

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91 See id.
92 789 F.2d at 163.
93 See Abitabile, supra note 9, at 46.
94 See 789 F.2d at 163.
95 Id.
96 Even a series of photographs cannot be copyright infringement, unless they captured a dance or a phrase within a dance as completely and continuously in sequence as audiovisual technology, i.e. film. See 789 F.2d at 163 (“It may be that all of the photographs [of the Nutcracker in Horgan]...are of insufficient quantity or sequencing to constitute infringement...”).
experienced and skilled in the art, can make that determination, perhaps best through expert testimony before courts, the Copyright Office, Congressional committees, and administrative agencies. Before Horgan was remanded to the district court, the parties reached an out-of-court settlement. This sort of finale suggests that the 1976 Copyright Act as it currently stands and any judicial review of the Act are inadequate, insufficient, and incompatible with dance as an art, a community, and a culture.

The only way that choreographers will seek federal copyright protection for their work is if the law is compatible with dance as an art, unsatisfactory to choreographers’ needs, and unaffordable. To increase the number of dance choreography registered for copyright protection, the federal government must take action. Primarily, Congress should rebalance the monetary issues to appeal to the needs of the majority of choreographers. As a practical step, the best area in which to do this is to fund the fixation requirement. Various combinations of funding may be created, such as special grants to choreographers or tax deductions for businesses, corporations, philanthropic associations, and individuals who make new technology used to fixate dance affordable for choreographers. Most importantly, if the federal government is to fulfill its purpose of the 1976 Copyright Act with respect to dance choreographers, as it does to literature, art, and other copyrightable works, then it should, due to dance’s current “second-class status,” take affirmative action to provide copyright protection both financially and legally. Choreographers cannot currently afford copyright protection, but the federal government can — and should.

LERMONTOV: Don’t forget, a great impression of simplicity can only be achieved by great agony of body and spirit.

II. The World of Dance

Choreographers do not actively seek statutory copyright protection because they see no clear benefits from it. While choreographers fundamentally desire recognition and preservation, the Act offers only economic incentives, which, if acquired, the financially distressed choreographer very often quickly conveys away by assignment, license, or sale. Ultimately, only the most successful choreographers — the Balanchines of the world — are financially successful enough to realize, retain, and capitalize on the economic rights offered by the Act. The majority of choreographers make do with the custom of the dance community, which already guarantees choreographers the same economic rights. Because the “second-class status” of dance inspires little to no financial success or incentive, economic rights are not of

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97 But see Abitabile, supra note 9, at 46.
98 See Cramer, supra note 1, at 152.
99 See Abitabile, supra note 9, at 60.
100 Id.
101 Id.
102 THE RED SHOES, supra note 42.
103 See Singer, supra note 3, at 317.
104 See id.
105 Id. at 317-18.
paramount importance to most choreographers. Rather, a choreographer’s creative impetus stems from the desire to communicate an artistic statement.106

Dance choreographers also believe that the current provisions of the Act illustrate precisely the lack of understanding that those outside the dance community have regarding the art of dance choreography and the dance community itself.107 For instance, the dance community uses a much broader definition of choreography than that in the Act.108 Additionally, the dance community worries that by requiring copyrightable works to promote the “useful arts”, legislators and courts might be tempted to “judge the moral worth of choreographic works.”109 This bias is constitutionally based and would be harder to overcome in the effort to gain sufficient copyright protection for dance choreography.110

Although the Act’s requirements are difficult for dance choreographers to satisfy, they are not insurmountable.111 First, choreography should be defined more clearly and broadly,112 deleting the originality requirement because it is unnecessary and misleading.113 Second, rather than sponsoring a special exception to the fixation requirement for choreographic works,114 the federal government should simply subsidize ground-breaking computer technology that adequately records dance and satisfies the existing fixation requirement.

A. Dance Custom

Choreographers, dancers, and some lawyers agree that the customs of the dance community offer an alternative and more practical form of copyright protection for dance choreography.115 The dance community considers artistic individualism supreme116 and recognition the ultimate reward.117 Based primarily in New York City, choreographers, dancers, and some patrons of the art foster a close-knit, protective community that possesses similar yet sometimes unique beliefs, talents, and ideas.118 Therefore, only members of the dance community, not courts or legislators, have the credible knowledge and understanding necessary

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106 Unlike some accountants, actuaries, and other professionals, dance choreographers do not become choreographers for the money because there is no money in dance. See The Wall Street Journal CareerJournal.com, supra note 7. Even if a financially lucrative market for dance existed, most choreographers would still only choreograph primarily for incentives other than money. Dance is such an intimate, human expression that some people couldn’t be paid to do it, and some dance styles require a technique and form only some people are physically capable of doing, understanding, and manipulating. Also, simply stated, not everyone can choreograph—at least, not everyone can choreograph well; dance is, after all, an art.
108 Id.
109 See id. (citations omitted).
110 See id. This issue concerns First Amendment rights, which lie beyond the relevant scope of this essay.
111 See Lopez de Quintana, supra note 38, at 171.
112 See id.
113 See id.
114 But see id.
115 See Singer, supra note 3, at 290.
116 Lopez de Quintana, supra note 38, at 144.
117 See Abitabile, supra note 9, at 55.
118 See id.
to make artistic decisions.119 A judge making a dance choreographic decision is like a History teacher grading a Physics exam.120

Within the dance community, customary copyright protection extends long after a choreographer dies.121 After a choreographer’s death, his or her dance choreography risks being lost. To prevent this, members of the dance community who admire the choreographer’s dances will pass them down to other dancers through memory and traditional oral instruction.122 Oral tradition upholds dance’s integrity through style, motivation, and content, but the muscle memory of dancers can easily fade: the longer a dance is not performed, the more difficult it becomes to reconstruct it and to bring it back onstage.123 Although memory is fallible, the dancers rigorously rehearse these handed-down dances in an effort to preserve the original choreographer’s artistic integrity.124 Unfortunately, many important dances are lost through the years125 because no method of notation or recordation has ever been widely used to the same effect that written language is used to record a people’s history, culture, and literary art. This loss of art and knowledge is a primary reason the law should change.126

Recognition for dance choreography is simply the attachment of the choreographer’s name to every performance of his or her dance without regard to whether the choreographer, the dance company, or some other entity has legal ownership of the dance.127 Recognition is generally accomplished by announcing the choreographer’s name immediately prior to the performance, usually by listing him or her in the performance handbill.128 In this way, the audience is sufficiently informed of the “author” of the dance, thereby preventing confusion as to its creative and artistic origin.129

Dance companies customarily consult with the choreographer before acquiring permission to perform the desired dance.130 First, the choreographer visits the studio to determine if the company is capable of performing the dance, evaluating both the technical abilities and the personalities of the company dancers.131 Permission to perform the dance is granted if the choreographer is satisfied that the skills of the company will reflect the artistic value of the dance.132 Second, after the choreographer assents to performance, the company

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119 See id.
120 Id.
121 Lopez, supra note 38, at 163.
122 See id.
123 See Carmen, supra note 14.
124 See Lopez, supra note 38, at 163-64.
125 See id. at 164.
126 Nowadays, with a diet of pop music and reality television shows, the general public is losing its interest—and, from a certain perspective, its good taste—in great art such as dance. See Willey, supra note 8. A government should not stand by and watch its society waste away. That arguably would be the equivalent of a government standing by doing nothing while pollution wrecks its environment, or while hotels, restaurants, and public schools discriminate against customers and children based on race alone.
127 See Watkins, supra note 107, at 443.
128 See id.
129 Id.
130 Singer, supra note 3, at 293-94.
131 Id. at 294
132 See id.

5 Chi.-Kent J. Intell. Prop. 188
signs a formal licensing agreement. As the licensee, the dance company acquires the right to perform a specified dance for a certain period of time or number of performances. It agrees to pay a license fee for the performance rights and a royalty for each performance given, but the average fee is usually less than $10,000. This is extraordinarily poor compared to the pop music recording industry, which rakes in staggering royalties for simple television commercials. Third, this licensing agreement also usually insures the integrity of the performances, reserving artistic control for the choreographer. The choreographer teaches the dance and supervises a specified number of rehearsals, including final stylistic rehearsals and staging.

Breaches of these licensing contracts are rare: the breaching choreographer's marred reputation is punishment enough to keep the choreographer from doing so. Community sanction prevents most if not all such violations. Thus, there is little need for choreographers to seek protection for their dance choreography outside the dance community. There are several justifications for a choreographer's refusal to resort to the legal arena for copyright protection. First, some choreographers view unlicensed performances as a fair risk of the trade of choreography and as desirable free publicity, so long as they are credited with creating the dance. Second, most choreographers prefer negotiation or peer pressure to settle their differences with breaching licensees. Third, even choreographers who initially consider pursuing legal action are discouraged by the costs of litigation. Finally, unless the choreographer initially possessed sufficient bargaining power to insure that contract provisions favor him, legal enforcement of the contract may not offer much relief. Because choreographers are primarily concerned with fair recognition and preservation of their dances, monetary damages are often unsatisfactory. Most choreographers care less about money than they do about expressing themselves creatively with their dances.

B. A Perfect Arabesque: The George Balanchine Trust

During his lifetime, George Balanchine generously allowed other ballet companies to perform his dances. Sometimes he even allowed fledgling ballerinas and companies to perform his dances because he knew the musicality and craft of his choreography would make...
them better dancers.\textsuperscript{150} As Barbara Horgan, long-time assistant to Balanchine and former head of the Balanchine Trust, observes, “As long as they want to do it, let them try it.”\textsuperscript{151} He usually never charged fees to Americans, asking only incidental expenses and royalties from foreign ballet companies.\textsuperscript{152} The George Balanchine Trust continues this tradition, charging reasonable, affordable licensing fees for the privilege of performing his great dances.\textsuperscript{153} These fees are sometimes even adjusted downward to accommodate the budgets of smaller companies.\textsuperscript{154} For the Trust as for Balanchine himself, making money from royalty fees plays only a secondary role to disseminating the dances across the world.\textsuperscript{155}

In this will, Balanchine acknowledged that “dance has always been created and handed down through personal contact.”\textsuperscript{156} Fitting dance custom into a legal form, he specifically bequeathed the domestic, foreign and media rights in 113 of his ballets to fourteen individual legatees,\textsuperscript{157} although only about eighty have been reconstructed and could be staged today.\textsuperscript{158} These legatees formed The George Balanchine Trust to accomplish three principle objectives: (1) to simplify and encourage licensing Balanchine’s ballets, (2) to disseminate his choreography worldwide, and (3) to guarantee that performance quality would be both authentic and satisfactory.\textsuperscript{159} The goal of the trust is not just to preserve but to keep alive Balanchine’s incredible choreographic legacy and contribution to both the dance community and the world. “After all, you can’t hang [dances] on a wall,” says Horgan. “[Dance is] meant to be performed.”\textsuperscript{160}

The George Balanchine Trust is a perfect example of how to legal practices may conform to dance custom. The trust both records of Balanchine’s dances and subsidizes companies wishing to perform those dances by granting discounts. If a private trust is capable of doing this, then the federal government ought to be capable of subsidizing the fixation requirement for all choreographers.

III. The World to Come

A. Choreography (Un)Defined

As discussed above, the failure of Horgan illustrates the necessity for Congress to provide an improved definition of “choreography” as part of an amendment improving the overall provisions of federal copyright protection for dance choreography.\textsuperscript{161} Choreography is a

\begin{flushleft}
\textsuperscript{150} Carmen, \textit{supra} note 14.
\textsuperscript{152} Swack, \textit{supra} note 12, at 286.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} See \textit{id.} at 269 (citations omitted).
\textsuperscript{157} See \textit{id.}
\textsuperscript{158} Felciano, \textit{supra} note 152.
\textsuperscript{159} See Swack, \textit{supra} note 12, at 271.
\textsuperscript{160} Felciano, \textit{supra} note 152.
\textsuperscript{161} See Abitabile, \textit{supra} note 9, at 47.
\end{flushleft}
Some choreographers loosely define choreography as anything a choreographer presents to the public. Perhaps the best definition of dance choreography—and therefore the one which should be amended into the Copyright Act—is proposed by anthropologist Joann Keali‘iinohomoku: “Dance is a transient mode of expression, performed in a given form and style by the human body moving through space. Dance occurs through purposefully selected and controlled rhythmic movements; the resulting phenomenon is recognized as dance both by the performer and the observing members of a given group.”

While such scholarly breadth and depth may appear overwhelming, this definition is most admirable in that it leaves the final decision about what is and what is not dance—and thus what is and is not copyrightable—to the people with the most at stake: the dancers and their audiences. The issue of whether or not a movement is indeed dance depends, roughly, on whether or not it is called “dance” by the society which gives rise to it.

The “original” requirement of the current Act’s definition of choreography should be repealed. Choreographers customarily borrow elements from other choreographers who inspire them, from their teachers, and from various elements of the world. Thus it is virtually impossible—and uncustomary—for a dance choreographer to be absolutely original. Twyla Tharp describes the process of creating a dance as a collage:

I start every dance with a box. I write the project name on the box, and as the piece progresses I fill it up with every item that went into the making of the dance. This means notebooks, news clippings, CDs, videotapes of me working alone in my studio, videos of the dancers rehearsing, books and photographs and pieces of art that may have inspired me....For a Maurice Sendak project, [for example,] the box is filled with notes from Sendak, snippets of William Blake poetry, toys that talk back to you.

To separately require a dance to be original when pure originality is impossible effectively denies federal copyright protection to dance choreography. If pure originality is not required and some borrowing is allowable, as it should be, then a separate “originality” requirement is unnecessary and misleading—its separation from other requirements misinterpreted as emphasis—and still should be repealed. Rather, if a dance is accused of infringing upon another dance because of its substantial similarity, it should be more correctly classified as a derivative work, and a case of infringement should be built on that. The appropriate remedy would be either an injunction, a settlement that follows dance custom by providing for licensing and royalties, or copyright protection granted exclusively for the new part or enhancement of the original choreography, provided the original choreography rests in the public domain.

162 Singer, supra note 3, at 298.
163 See id. at 297.
165 Id.
166 MCFEE, supra note 2, at 287.
167 See Lopez de Quintana, supra note 38, at 155-56.
B. Tangible Intangibility

Members of the dance community and concerned advocates of dance choreographers are optimistic about recent developments in computer technology to satisfy the fixation requirement.\(^{169}\) In the past, consensus was that education and technology had to be significantly developed before any method of recording could truly capture the art of dance.\(^{170}\) Experiments are being performed to record dance choreography with videographics and other forms of computer technology, but they are viewed as some futuristic mode still to be developed for fixing dance.\(^{171}\)

Merce Cunningham was the first major choreographer to use computer technology to record and in some cases to create his dances.\(^{172}\) He utilizes it in each of his dances.\(^{173}\) Using a program called Life Forms, which allows the user to manipulate three-dimensional figures, Cunningham fixes movements exactly as he wants them to be performed.\(^{174}\) Cunningham asserts he can be creative at any time, day or night, even when dancers are not available.\(^{175}\) The program is an important tool that helps him visualize dance,\(^{176}\) providing three-dimensional views from every angle, which help dancers learn and understand movement free of human error.\(^{177}\) Cunningham explains, “Previously, I would make notes myself, as explicit as I could, but that’s not the same thing as having this figure do the movement...Dancers learn [best] by watching somebody do something.”\(^{178}\)

In Life Forms, wire-frame graphic figure images represent each dancer, and the stage may be manipulated to be viewed from different angles.\(^{179}\) Individual postures and stances are created, edited, stored, retrieved, and combined to create many forms of movement.\(^{180}\) Automatic interpolation and extension of movement allow the positions to flow automatically from one to another, thus presenting a dance.\(^{181}\) Each movement phrase can be sequenced into an animation, which in turn can be combined to create as well as to record larger, full-scale dances.\(^{182}\) Simple dances can also be expanded in more complex works to incorporate as many dancers on the computer screen as desired.\(^{183}\) The basics of Life Forms software can be quickly learned and easily used with a little practice.\(^{184}\) Choreographers, dancers, teachers, and students

\(^{169}\) See Cramer, supra note 1, at 150.
\(^{170}\) See id.
\(^{171}\) See id.
\(^{172}\) See Lopez de Quintana, supra note 38, at 160.
\(^{174}\) Lopez de Quintana, supra note 38, at 160-61.
\(^{175}\) Cramer, supra note 1, at 150-51.
\(^{176}\) Id. at 151.
\(^{177}\) See Lopez de Quintana, supra note 38, at 161.
\(^{178}\) Cramer, supra note 1, at 151 (citations omitted).
\(^{180}\) Id.
\(^{181}\) See id.
\(^{182}\) See id.
\(^{183}\) Id.
\(^{184}\) Id.
with basic skills on Macintosh computers, can create, perform, and record dance choreography.\textsuperscript{185}

Due to the success of Life Forms, the software company that initially created the program recently introduced a specialized version for the dance community: Dance Forms 1.0, the first choreography software designed with the assistance of dance teachers and choreographers themselves.\textsuperscript{186} In addition to Life Forms’ capacity, which enables choreographers to sketch out choreographic ideas and animate figures three-dimensionally, Dance Forms 1.0 also provides existing libraries and palettes of dance movement, thereby assisting the choreographer.\textsuperscript{187} The updated interface uses dance-friendly terminology and is an ideal tool for teaching, relaying, and recording choreography.\textsuperscript{188}

However, some choreographers do not trust this new computer technology because they believe it cannot express the fundamental choreographic element of emotion.\textsuperscript{189} Choreographer Jeff Bickford asserts that computer technology has nothing to do with making a dance: “You figure it all out [on the program], and then you just go in [to the studio] and put it on people, so they’re just interpreting the figures on a screen. Using computers to develop dance forms to find new things that human beings can do, I mean, that sounds like such a crock to me.”\textsuperscript{190}

Despite this criticism, computer technology may be the best way to facilitate compatibility between the dance community and the legal arena. Michael Bloom, formerly within the administration of Merce Cunningham Dance Company agrees, “The computer is information. The computer is not art. The law understands information. The law does not understand art.”\textsuperscript{191} Cunningham also remains optimistic:

[D]ancing at the moment has many opportunities with technology. There are ways to think about movement that technology can open up....Life Forms isn’t a revolution, [but] an enlargement of possibilities that were always there....As a dance notation, [Life Forms] increases the possibilities [because] it is immediately visible....[A choreographer or reconstructor can] try it to find out something....It’s not that [they or their dancers] can’t do it, [they] just have to find out how.\textsuperscript{192}

**Conclusion**

The 1976 Copyright Act in regards to dance choreography ought to be amended on the two points discussed above. First, the definition of dance choreography — and therefore the definition of what is and is not copyrightable in dance — should be determined by choreographers, dancers, and other knowledgeable members of the dance community. This can

\textsuperscript{185} See id.
\textsuperscript{187} See id.
\textsuperscript{188} See id.
\textsuperscript{189} See Lopez de Quintana, supra note 38, at 161.
\textsuperscript{190} Cramer, supra note 1, at 151 (citations omitted).
\textsuperscript{191} Id. at 154 (citations omitted).
\textsuperscript{192} Joyce, supra note 174.
be accomplished through expert testimony to courts, the Copyright Office, Congressional Committees, and other administrative agencies. A new, broader definition should then be amended into the 1976 Copyright Act. Second, because technology has developed to sufficiently record dance, the requirement that dance choreography be “fixed in a tangible medium” may remain, but the federal government should provide subsidized funding to choreographers so that their meager budgets may afford the new technology. Funding could increase the use of software programs like Dance Forms, thereby satisfying the Act, acquiring federal copyright protection for choreography, and keeping the art form of dance alive as a valuable treasure of American society and culture for generations to come.

Dance is not an easy thing to do, nor is it impossible. Dance comes from something inside us, from our bodies and our souls; all we have to do is dance. Similarly, adequate dance copyright is not an easy thing to do, but nor is it impossible. It will come from careful consideration, effort, and cooperation from both lawmakers and the dance community; all we need to do is — to put it metaphorically — dance together.

MONTAGNE: You’re a magician, Boris. To have produced all this...and from nothing.

LERMONTOV: My dear Livy, not even the best magician in the world can produce a rabbit out of a hat if there is not already a rabbit in the hat.193

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193 THE RED SHOES, supra note 42.