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## **MUSIC AND DANCE: BEYOND COPYRIGHT TEXT?**

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### **Abstract**

Are experiential, experimental forms of music and dance beyond protection by copyright? If they are, how might these art forms best be protected by cultural policy and cultural economics? These were the key questions that we set out to investigate with the support of a Beyond Text grant from the Arts and Humanities Research Council and with the help of our network members where together we formed an interdisciplinary team comprised of experts in copyright law, cultural policy, cultural economics, dance and musical composition. Through a series of interviews with musicians, singers, songwriters, composers, dancers, choreographers and others involved in the music industry and dance community we came to the conclusion that these types of works are both *before* copyright and *beyond* copyright. They are *before* copyright because what matters to the majority of those involved is the process of creation – which itself is constantly evolving – rather than the product – the protected work once fixed. They are *beyond* copyright because key aspects of the performance involve contributions which are not recognised by copyright, and because there is much about the performance which simply cannot be captured in the mechanical sense. As a result, policy intervention, which focuses on the product rather than the process, becomes problematic. This article suggests a series of practical recommendations made by our interviewees for ways in which the art forms may be supported into the future.

We are grateful to all of our interviewees, some of whom feature in our documentary *Performers on the Edge*, published in *Audiovisual Thinking: the journal of academic*

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*videos*,<sup>2</sup> and who have remained in touch and contributed extra evidence to this project which can be found on our project website,<sup>3</sup> and who joined us at our dissemination event in September 2011 in Glasgow.

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<sup>2</sup> [www.audiovisualthinking.org/](http://www.audiovisualthinking.org/) (accessed 12 Dec 2011).

<sup>3</sup> This will be published on the [www.beyondtext.ac.uk](http://www.beyondtext.ac.uk) (accessed 13 Dec 2011) website and archived at the British Library in due course.

## 1. Introduction

Experimental, experiential, avant-garde forms of music and dance are frequently the product of collaboration between individuals striving towards a common aim – the development of a work designed to satisfy the creative aspirations of those involved. Often improvised, and often not fixed or recorded, the traditional methods to protect authorship and support exploitation of the work through the law of copyright – which is obsessed with categorisation, fixation, individual authorship and limited creative spaces in which to create afresh – are hard to apply to creative work in often fluid and small-scale cultural milieux. Frequently fleeting, many forms of music and dance seem better subsumed beneath the label of performance. However, performers' rights might seem inadequate for the task of protecting the interests of the participants and enabling them to exploit their works. With limited protection at international level<sup>4</sup> that has resulted in patchwork but complex protection at national level,<sup>5</sup> performers' rights seldom grant the breadth or depth of protection that copyright does. One example is the length of term of protection. In the UK, in common with many other countries, copyright lasts for 70 years after the death of the author.<sup>6</sup> Performers' rights by contrast last for 50 years from when the performance is made available.<sup>7</sup> Another example is the scope of protection. For copyright, protection is given against the copying of the whole or a substantial part of a work.<sup>8</sup> For performers, by contrast, the right is given only against the copying of the recording itself – leaving any third party free to recreate the underlying performance in whole or in part.<sup>9</sup>

But this is to assume that bigger, stronger, broader, more all-encompassing property rights, which for copyright depend upon fixation for their existence, and for performers' rights their secondary exploitation, would best meet the needs of this sector of the creative industries. Funded by the UK Arts and Humanities Research Council's (AHRC) 'Beyond Text' programme<sup>10</sup> we carried out a series of in-depth

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<sup>4</sup> *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961* (hereafter Rome Convention) is weak on the protection of performers rights although they have been somewhat strengthened by the *WIPO Performances and Phonograms Treaty 1996* but there remain gaps. See R Arnold, *Performers Rights* (4<sup>th</sup> ed.) (London: Sweet and Maxwell, 2008). This is particularly so in comparison with copyright which is protected, *inter alia*, in the *Berne Convention for the Protection of Literary and Artistic Works 1886* (as amended) (hereafter Berne Convention), the *WIPO Copyright Treaty 1996* and the *Agreement on Trade-Related Aspects of Intellectual Property Rights 1994* (hereafter TRIPs Agreement).

<sup>5</sup> *Copyright Designs and Patents Act 1988* (hereafter CDPA), ss 180-206 in terms of which performers are accorded property and non-property rights.

<sup>6</sup> CDPA, s 12. In the Berne Convention the term of protection is 50 years pma.

<sup>7</sup> CDPA, s 191. To be extended to 70 years. See *Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights*.

<sup>8</sup> CDPA, s 16. *Ladbroke (Football) Ltd. v William Hill (Football) Ltd*, [1964] 1 WLR 273.

<sup>9</sup> CDPA, ss 183, 184. Although a second performance could never be the same as a first.

<sup>10</sup> Members of the research network are: Charlotte Waelde; Philip Schlesinger; Fiona Macmillan, Professor of Intellectual Property, Birkbeck College, London; Helen Thomas, Professor of Historical

interviews with dancers, musicians, video artists, recording artists, composers, industry representatives, and others. Our central question was whether experiential, experimental forms of music and dance are beyond the protection of copyright. If so, what are the implications for those engaged in creative work and also for those pursuing the creative economy agenda that has dominated policy thinking in the UK from the advent of New Labour in 1997 to the Conservative-led Coalition established in 2010?<sup>11</sup>

Our research has elicited some key messages. While copyright protection does arise once these works are fixed, the most persistent point is that it is immensely difficult to institutionalise experimental, experiential forms of music and dance, that is, to establish stable, predictable relations of production and circulation easily susceptible to fixation or policy intervention. The art forms were constantly evolving. From conception to realisation, there was continuous change in the ways in which the works were produced. Allied to this is the immediacy of the performance, which for dance in particular, tends to defy, or at least resist, fixation. The collective nature of the creative endeavour, both in music and in dance, was another strong theme, raising interesting questions about how to attribute ‘authorship’. Given our sample, we found that where more than one artist was involved – whether in the development of the performance of a musical piece or the crafting of a dance onto the body of a dancer – the process was a highly collaborative one, the ideal of which was a culture of equality of contribution, attribution and sharing in outputs. Our interviewees were, without exception, fiercely committed to their art and to the desire to realise their vision while at the same time recognising that often their output was not likely to be commercially viable – a factor which led to many having ‘portfolio’ careers, with trade-offs being made between commercial work and what was regarded as genuinely creative work.

The most recent reviews of the intellectual property framework in the UK provide clear illustrations of a prime focus of the law and of cultural policy both of which tend to look to the end result – to identify those who emerge from the creative milieu and their completed works. In doing so, the dominant line in official thinking largely overlooks the process of cultural production. Both the Gowers<sup>12</sup> and Hargreaves

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and Cultural Studies, University of the Arts London; Michael Alcorn, Professor of Musical Composition, Queen’s University Belfast; Gillian Doyle, Senior Lecturer in Media and Cultural Policy, University of Glasgow. Outputs from the research have included a documentary, *Performers on the Edge*, published in the peer reviewed journal *Audiovisual Thinking* at <http://www.audiovisualthinking.org/>; a paper to be published in *Innovation: The European Journal of Social Science Research*; an archive of recorded material and transcripts from interviews to be contained within the [www.beyondtext.ac.uk](http://www.beyondtext.ac.uk) website which includes a recording from the final dissemination event held in Glasgow on 6 September 2011.

<sup>11</sup> For a pertinent discussion of how creative economy policy was made, see P Schlesinger, “Creativity and the experts: New Labour, Think Tanks and the Policy Process” (2009) 14(3) *International Journal of Press Politics* 3-20.

<sup>12</sup> Gowers Review of Intellectual Property 2006. Published by the Stationery Office ISBN 0118404830 Available at <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.pdf> (accessed 13 Dec 2011).

Reviews<sup>13</sup> have noted how important intellectual property is to the British national economy, with the Hargreaves review concentrating particularly on copyright and thus the means by which the output of the creative process can be protected. The product therefore dominates the process itself, certainly for the art forms under discussion in this article,<sup>14</sup> and this means that the importance of what evades capture tends to be ignored.

This article will examine the legal framework for some innovative forms of music and dance – focusing most on copyright but also including some comment on performers' rights. It will highlight those aspects of copyright that seem least suited to protect avant-garde works. It will consider the case law and examine how that parcels out and allocates rights and obligations amongst the participants. It will move on to highlight the key themes to emerge from the interviews conducted and assess the relationship between the findings that emerge from the empirical research and the legal framework. Finally, and in a challenge to the prevalent current policy focus on outcomes, it will consider what strategies might be devised to better sustain the largely precarious milieu that constitute the typical experience of creative work.

## **2. Dance and Music: Similarities and Differences**

Some preliminary points will help to set the scene and to place experiential, experimental forms of music and dance within their artistic, legal and cultural framework.

### ***2.1. The Political, Cultural, Social and Legal Background***

Music, and in particular the woes of the recording industry as a result of seemingly uncontrollable copying of music files on the internet<sup>15</sup>, has been much in the news lately,<sup>16</sup> as have the attempts by the music industry to lobby for increased rights, at

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<sup>13</sup> I Hargreaves, *Digital Opportunity: a Review of Intellectual Property and Growth* (May 2011) Hargreaves Review available at <http://www.ipo.gov.uk/ipreview.htm> (accessed 13 Dec 2011).

<sup>14</sup> The Hargreaves Review did make suggestions for reform to the law to take some processes of creation which rely on copying of existing works out of the infringement provisions – such as encouraging the EU to add an exception to the copyright framework for text and data mining. Recommendation 5.

<sup>15</sup> The academic literature on this subject is extensive and there is a growing body of court cases. One of our interviewees, the veteran singer-songwriter, producer, and trade unionist, Rab Noakes, commented: “The record industry is living in a terrible state about piracy and in some ways, should have seen it coming...that’s people in the audience who came up with those ideas, how to create file sharing and so on. The industry didn’t come up with that, the audience did, and the industry should have been quicker off the mark in realising the transaction that it could have had there, and it just went off to another place.” Interview: Philip Schlesinger and Rab Noakes, 10 May 2010. (Hereafter Schlesinger/Noakes.)

<sup>16</sup> The PRS for Music report giving statistics for 2010 (released on 4 August 2011) suggested a decline in UK revenues of 4.8% albeit with an increase in exports. [www.prsformusic.com/creators/news/research/Documents/AddingUpTheUKMusicIndustry2010.pdf](http://www.prsformusic.com/creators/news/research/Documents/AddingUpTheUKMusicIndustry2010.pdf) (accessed 13 Dec 2011).

one point even citing performers' pensions as a key motivation.<sup>17</sup> Musicians have been in the courts over disputes typically arising many years after the creation of a work and when it becomes a commercial success.<sup>18</sup> Key questions for the courts to determine have included matters of copyright authorship and ownership in the work and consequently who is entitled, as a matter of copyright law, to share in the proceeds of exploitation.<sup>19</sup> From a news reporting and legal perspective, the discourse surrounding dance is completely different – or more to the point - it is largely absent. As with music, dance is protected by copyright legislation, and dance performers by performers' rights. But in the UK there has been next to no journalistic comment or case law and little legal academic discussion relating to dance. This means that in this case legal analysis necessarily starts from first principles. That said the similarities (and differences) in music and dance as performative art forms means that lessons from the music sector inform the discussion of dance.

## **2.2 The Organisational Framework**

Important differences exist in the organisational framework for music and dance which in turn have consequences for the ways in which they are supported within society. Music is exceptionally well served by a plethora of bodies representing the songwriters, musicians and performers as well as the interests of the companies through which much music is recorded and made available. So for the participants in the music industry there are unions,<sup>20</sup> representative bodies designed to promote the genre,<sup>21</sup> a music industry which is powerful and vocal,<sup>22</sup> and collecting societies for both performers and exploiters.<sup>23</sup> Dance looks very different. There are a number of organisations that represent the interests of dancers, choreographers, teachers, students, companies, theatres and the public<sup>24</sup> although it seems that the 'dance industry' is altogether a less cohesive, less vocal and less powerful group as compared

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<sup>17</sup> "Music Stars 'Must Keep Copyright'" (17 May 2007) Available at <http://news.bbc.co.uk/1/hi/6661283.stm> (accessed 13 Dec 2011). Despite the lack of economic evidence to support its implementation the term of protection has been extended. See note 6 above.

<sup>18</sup> *Fisher v Brooker*, [2009] UKHL 41; [2009] 1 WLR 1764. Fisher waited 40 years before taking a case in which he sought to be recognised as joint author of a work. Contract interpretation is also a common source of dispute. *Lancaster v Handle Artists Management Ltd*, [2008] EWCA Civ 1111; *Wadlow v Samuel*, (aka Seal) [2007] EWCA Civ 155.

<sup>19</sup> *Fisher v Booker* *ibid*; *Hadley v Kemp*, [1999] EMLR 589.

<sup>20</sup> "Musicians' Union" [www.musiciansunion.org.uk/](http://www.musiciansunion.org.uk/) (accessed 12 Dec 2011). Rab Noakes (see note 14 above), is Chair of the Executive Committee of the Musicians' Union.

<sup>21</sup> E.g. "Sound and Music" [www.soundandmusic.org](http://www.soundandmusic.org) (accessed 13 Dec 2011) – "an organisation dedicated to raising the profile of new music and sound".

<sup>22</sup> There are four major music companies: Universal Music Group, Sony Music Entertainment, Warner Music Group and EMI.

<sup>23</sup> Including Phonographic Performance Limited (PPL); Mechanical Copyright Protection Society (MCPS) and the Performing Rights Society (PRS). MCPS and PRS sit under the umbrella organisation PRS for Music.

<sup>24</sup> "Dance organisations" [www.danceorganisations.org.uk/](http://www.danceorganisations.org.uk/) (accessed 12 Dec 2011).

with music.<sup>25</sup> Certainly dancers may become members of Equity,<sup>26</sup> but they seem not to have a dedicated trade union or guild<sup>27</sup> charged with looking after their interests. When it comes to negotiations in music and dance over exploitation, these organisations all have an interest in exploitation of rights – both copyright and performers’ rights. The landscape is characterised by individual and collective bargaining (through bodies such as BECTU<sup>28</sup>), which has grown up over a number of years and rests on copyright and, more recently, performers’ rights (administered through BECS<sup>29</sup>). Given that copyright developed before performers’ rights, and that the music industry is exceptionally powerful, copyright owners are favoured over the performer in exploitation of rights and size of income.<sup>30</sup>

### ***2.3 Experiential, Experimental Music and Dance***

Both similarities and differences between experiences and perceptions of the two art forms emerged during our interviews. The diversity of means by which dance may be notated (including Laban; Benesh; Eshkol-Wachman) was compared with the universal use of musical notation - although not all musicians are able either to notate or read music<sup>31</sup> and few dancers are skilled in the art of dance notation in any form. There was speculation as to what this might mean in terms of scope for interpretation of the notated or scored work<sup>32</sup> and how much room for manoeuvre was left for individual interpretation by the musician and dancer beyond this.<sup>33</sup> Another focus was the importance of the concept behind the work, where it is often one individual who has the vision and drive, although in both music and dance there was a clear

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<sup>25</sup> We held a ‘dancers’ focus group’ in London on Tuesday 29 March 2010. Interviewers: Philip Schlesinger, Charlotte Waelde, and Helen Thomas. Interviewees: Jenni Wren, choreographer and dancer Slanjayvah Danza; Aurora Fearnley, independent film maker and visual artist; Mary Kate Connolly, researcher, Laban Conservatoire; Emma Redding, programme leader Masters in Dance, Laban Conservatoire; Fiona Geilinger, independent film maker and visual artist; Johan Stjernholm, choreographer and dancer, Space Engineering (hereafter ‘dancers’ focus group). During the course of this group interview, when the question of dance organisations was raised our interviewees found it hard to point to a single umbrella organisation they felt represented their interests. They also thought that compared to music, dance was a very small-scale industry and a weak lobby.

<sup>26</sup> “Equity” [www.equity.org.uk/home/](http://www.equity.org.uk/home/) (accessed 12 Dec 2011).

<sup>27</sup> There are specialist guilds such as the Laban Guild. “Laban guild for movement and dance” [www.labanguild.f9.co.uk/aboutUs.html](http://www.labanguild.f9.co.uk/aboutUs.html) (accessed 12 Dec 2011).

<sup>28</sup> “The Media and Entertainment Union” [www.bectu.org.uk](http://www.bectu.org.uk) (accessed 12 Dec 2011) “BECTU is the independent trade union for those working in broadcasting, film, theatre, entertainment, leisure, interactive media and allied areas”.

<sup>29</sup> “British Equity Collecting Society” [www.equitycollecting.org.uk/](http://www.equitycollecting.org.uk/) (accessed 12 Dec 2011) “British Equity Collecting Society (BECS) is the UK’s only collective management organisation for audiovisual performers”.

<sup>30</sup> L Bently, “Authorship of Popular Music in UK Copyright Law” (2009) 12(2) *Information, Communication & Society* 179-204, at 187; A Parker, “A Raw Deal for Performers: Part 1 – Term of Copyright” (2006) 17(6) *Entertainment Law Review*, 161-166.

<sup>31</sup> For instance, Goldie (Clifford Joseph Price) and Florence of Florence and the Machine.

<sup>32</sup> Interview: Helen Thomas and Michael Alcorn. 12 Mar 2010. (Hereafter Thomas/Alcorn.)

<sup>33</sup> *Ibid.*

sense of shared contributions, all of which were needed to realise the concept.<sup>34</sup> Improvisation was often defined by what was *not* done in the realisation of the performance, rather than by what was chosen.<sup>35</sup> There were also several examples of musical performances which resulted from improvisation and while there was often significant prior planning and thought,<sup>36</sup> the performance itself resulted from the musicians coming together in a particular place at a particular time and improvising. This was mostly in public, and when not in public the performance might be recorded.<sup>37</sup> We were also offered examples of dance performances in public that were improvised. But often it seemed that there was more planning as to parts of the production – such as the start and finish. Within that framework, individual and collective contributions developed as the production unfolded.<sup>38</sup> There was also discussion about the spontaneity of dance in the context of social functions such as weddings and parties.<sup>39</sup> Several of our interviewees took the view that music is now considered a commodity. It is something that the listener wants instantaneously and (celebrity aside, which is key to the marketing of a performance) much is interchangeable.<sup>40</sup> Apart from a context in which ‘everyone dances’ (in the same way that ‘everyone sings’) dance was not thought of as a commodity in the same way. Dance mostly uses music as a backdrop<sup>41</sup> whereas none of the musicians interviewed incorporated dance into their performances (although of course many musicians do). This is perhaps why it is left to analysts of dance to describe the relationship between the two. Rachael Duerden has observed: “Dance and music have several features in common – rhythm, metre, tempo, and the fact that they are structured through space and time”,<sup>42</sup> although she goes on to argue that the relationship is much more understated: “...subtle and elusive aspects of dance-music relationships. ...works by choreographers known for their highly developed musicality,...is where the relationship really becomes something very special, something beyond – or different from – the dance and the music individually”.<sup>43</sup> It is a relationship that she considers

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<sup>34</sup> *Ibid.* Also Interview: Tamara Schlesinger and Daniel Deavin. 12 Nov 2009. Tamara Schlesinger is the singer and songwriter for 6 Day Riot; Daniel Deavin is the drummer for 6 Day Riot. (Hereafter Schlesinger/Deavin.)

<sup>35</sup> Interview: Michael Alcorn and Steve Beresford. 12 Mar 2010. Steve Beresford is a musician. (Hereafter Alcorn/Beresford.)

<sup>36</sup> Alcorn/Beresford. Michael Alcorn’s production, *Eclipse*. See below for a photograph of the performance.

<sup>37</sup> Alcorn/Beresford.

<sup>38</sup> For instance the series of improvised workshops organised by Johan Stjernholm with the Swiss dance group T42, consisting of Misato Inoue and Felix Dumeril. The result of the workshops was publicly performed by Misato, Felix, and Stjernholm in December 2010 at the Royal Academy of Dance. At other times performances were the result of much planning and practice. Jenni Wren and Johan Stjernholm in the dancers’ focus group and Interview: Philip Schlesinger and Cindy Sughrue. 2 March 2010. Cindy Sughrue is Chief Executive/Executive Producer, Scottish Ballet. (Hereafter Schlesinger/Sughrue.)

<sup>39</sup> Thomas/Alcorn.

<sup>40</sup> Alcorn/Beresford.

<sup>41</sup> Jenni Wren in dancers’ focus group. Schlesinger/Sughrue.

<sup>42</sup> R Duerden, “Dancing in the Imagined Space of Music” (2007) 25(1) *Dance Research* 73-83, at 74.



permeates the two but which is sometimes not obvious: "...the richness of dance-music relationships is found at the microscopic level just as much or even more than at the level of larger structural elements..."<sup>44</sup>

Such similarities and differences arising from our overview of the innovative, the experiential, and the experimental in music and dance help to contextualise the following discussion.

#### **2.4 A Word on the Case Studies**

Our target groups for study were those engaged in the creative production of experiential, experimental forms of music and dance. Our network members suggested that the ideal composition of focus groups or of individual interviews would comprise composers, choreographers, promoters and commissioners, performers and critics. In the event, for practical reasons to do with limited resources and time for fieldwork and the logistical complexity of fixing times with mostly freelance workers, it was not possible to assemble this kind of sample for the focus group in music. Instead, interviews were carried out on a one to one basis. For dance, our focus group meeting came more closely to our initial methodological aim. Given these limitations, we do regard this study as a pilot for a larger-scale piece of research.

Of the types of performance that we studied, our aim was to elucidate what we called 'the experiential', initially conceived of as those works that are best experienced live rather than recorded. We wanted to know what, if anything, eluded fixation and thus being captured as property rights. Our focus was on the individual artist or the small creative collective<sup>45</sup> although we did an interview with a large publicly funded dance organisation<sup>46</sup> – which gave us some extremely useful comparative evidence. What bound participants in this research together was a commitment to their art form. While in the overwhelming majority of cases individuals had to find a variety of forms of employment to bring in sufficient income to live, the aim was always to be able to continue with the art form and few were willing to compromise their work to make it more commercially exploitable.<sup>47</sup>

#### **2.5 Methodological Note**

Most of our interviews with musicians and dancers were video-recorded and those few that were not were audio-recorded. We also video-recorded some performances and sought permissions for these and any other copyright material used. All interviewees were given the opportunity to review transcripts of their interviews and to request the removal of any material they did not wish to enter the public domain. A

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<sup>43</sup> *Ibid*, 80.

<sup>44</sup> *Ibid*, 81.

<sup>45</sup> All of the members of our dancers' focus group worked as individuals or in small groups as did our musicians.

<sup>46</sup> Cindy Sughrue, Scottish Ballet.

<sup>47</sup> Dancers' focus group; Alcorn/Beresford; Schlesinger/Noakes; Thomas/Alcorn.

few minor requests were made. Permissions to use the interviews were sought in line with the ethical codes for human subjects in force at the researchers' universities and their professional associations. A number of the interviews and performances have been incorporated into the researchers' short video documentary, *Performers on the Edge*, noted above at fn.9.<sup>48</sup> Third-party interviews commissioned by the AHRC with the authors as well as two participants in the study are also available,<sup>49</sup> as is the fieldwork archive on which the empirical parts of this article are based.<sup>50</sup> The reader may therefore readily explore our empirical work beyond the confines of what is presented here.

In a study intended to be exploratory rather than comprehensive, we have sought to sample across a range of different cultural practices. We have drawn on a dancers' focus group comprising six participants; two joint interviews concerning music, each with two participants; one joint interview on music and dance (with one earlier music interviewee re-interviewed but on new issues); four individual interviews, three on music, one on dance; and three re-interviews, two on music and one on dance. In total, counting re-interviews and the group interview, this amounted to 19 testimonies.

Each of the interviews – whatever the form taken – involved substantial prior preparation in establishing the themes to be addressed while leaving open the scope for development in discussion. The interview schedules were therefore semi-structured in approach and carefully adjusted for each situation. The focus group – which, as is often the case, combined lines of questioning and crosscutting conversation – required moderation by the researchers, again based on a interview schedule prepared in advance of the meeting and used with considerable flexibility to allow scope for emergent topics.

### 3. The Statutory Framework and the Case Law, The Literature and the Evidence

Music and dance are recognised in the *Copyright Designs and Patents Act 1988*, the current UK legislation regulating copyright. Each has different historical roots. Music was protected during the 18<sup>th</sup> century when it was accepted as a work to which the 1710 Act could be extended; dance was included in the Copyright Act 1911. The CDPA continues the tradition of categorisation: musical and dramatic (including dance) works are separately listed<sup>51</sup> and defined.<sup>52</sup> In order to be protected by copyright a number of criteria must be met. First, the work must fall into one of the

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<sup>48</sup> P Schlesinger and C Waelde “Performers on the Edge”, (2011) 3 *Audiovisual Thinking* available at <http://www.audiovisualthinking.org/> (accessed 13 Dec 2011).

<sup>49</sup> AHRC, “Music and Dance: Beyond Copyright Text?” (2011) available at <http://projects.beyondtext.ac.uk/video.php> and [www.youtube.com/beyondtext](http://www.youtube.com/beyondtext) (accessed 13 Dec 2011).

<sup>50</sup> These will be available through the Beyond Text website [www.beyondtext.ac.uk](http://www.beyondtext.ac.uk).

<sup>51</sup> Both are within CDPA, s 1 (1) “Copyright is a property right which subsists in accordance with this Part in the following descriptions of work – (a) original literary, dramatic, musical or artistic works”.

<sup>52</sup> CDPA, s 3(1) provides “‘dramatic work’ includes a work of dance or mime; and

‘musical work’ means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.”

definitional categories; second, there must be the right creative effort or originality present in the work; third, the work must be fixed in some material form.<sup>53</sup> Once these factors are satisfied the tendency is to dissect the work to ask who has put in the appropriate creative effort to be viewed, in law, as an author with the attendant benefits of ownership that flow from having that status.

### 3.1 *The Work*

To be protected a court must identify and demarcate the scope of the property right by reference to one of the categories in the CDPA. This can cause difficulties for new subject matter. While case law suggests that judges may appreciate that musical works transcend the written score, categorisation of dance forms has proved challenging. Concerning music, it has been said that “... the essence of music is combining sounds for listening to” which should “produce effects of some kind on the listener’s emotions and intellect” which, however, is not the same as ‘mere noise’”.<sup>54</sup> There has been some disagreement between courts as to whether music encompasses melody, harmony and rhythm with courts appearing to be more open to including these within copyright in recent years than they were historically.<sup>55</sup> There is also a need to keep the distinction between the composition and arrangement of a musical piece firmly in mind – an important consideration for the experimental, improvised forms of music produced by a number of our interviewees. Copyright will subsist in an original composition<sup>56</sup> and a separate copyright can exist in an arrangement of the composition so long as the correct type of originality has been expended.<sup>57</sup> An unauthorised arrangement of a composition not in the public domain may result in copyright in the arrangement while infringing the underlying composition; an arrangement of a public domain work will result in copyright protection in the arrangement, but not in the underlying composition in which there will be no infringement.<sup>58</sup> The case law which has considered copyright in arrangements tends to leave the line between composition and arrangement rather fuzzy.<sup>59</sup>

Dance is more problematic in the sense that there has been minimal judicial consideration in the UK as to what amounts to a work of dance for the purposes of the

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<sup>53</sup> Paul Théberge refers to the historical origins of music copyright as “the Burdens of History”. P Théberge, “Technology Creative Practice and Copyright” in S Frith, and L Marshall (eds) *Music and Copyright* (4<sup>th</sup> ed) (Edinburgh: Edinburgh University Press 2004) 139-156, at 139.

<sup>54</sup> Mummery LJ *Sawkins v Hyperion Records* [2005] 1 WLR 3281.

<sup>55</sup> *Ibid.*

<sup>56</sup> First recognised in *Bach v Longman*, [1777] 98 ER 1274.

<sup>57</sup> *Austin v Columbia*, [1917-1923] MacG CC 398; *Robertson v Lewis*, [1976] RPC 169; *Redwood Music v Chappell & Co Ltd.*, [1982] RPC 109.

<sup>58</sup> H. Laddie, P. Prescott and M. Vitoria, *The Modern Law of Copyright and Designs* (3<sup>rd</sup> ed) (London: Butterworths, 2000) at 79.

<sup>59</sup> *Godfrey v Lees*, [1995] EMLR 307; *Beckingham v Hodgens*, [2002] EMLR 45; *Hadley v Kemp*, [1999] EMLR 589; *Fisher v Brooker*, [2009] UKHL 41. See also R Arnold, “Reflections on “The Triumph of Music: Copyrights and Performers’ Rights in Music” (2010) *Intellectual Property Quarterly* 153-164; R Arnold, “Are Performers Authors? *Hadley v Kemp*,” (1999) 21(9) *European Intellectual Property Review* 464-469.

legislation although it seems clear that a work of dance has to be capable of being performed.<sup>60</sup> There is no distinction between the composition of a dance (its choreography) and its arrangement – an omission that might be questioned given the creative effort expended by the dancers in realising a work. Whether this could result in the dancer being considered the author or a joint author of the copyright in the dance (its realisation) with the choreographer is an arguable point that will be further explored below.

This somewhat inconsistent authority for music and dearth of authority for dance, however, does raise questions. We think that we know what music is; we think that we know what dance is. But do we? Noise to one may be harmony to another; a story line to one, impenetrable to another. So are the copyright categories too constrained for experimental, experiential practices?<sup>61</sup> Our evidence has provided excellent examples. Michael Alcorn, the avant-garde composer, wrote a computer program which produced images on a screen that can be seen in the photograph below. The musicians watched the images and interpreted what they saw. The work is called *Eclipse*.

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<sup>60</sup> In a slightly odd case concerning an advertisement for Guinness in which an actor danced while a pint of Guinness was being poured and whether it was an infringement in the copyright of an earlier film, *Joy*, the High Court came to the conclusion that it was not a work of dance because what was shown in the advertisement was not capable of being performed. The film had been cut resulting in a series of jerky movements. The case was confirmed on appeal. *Norowzian v Arks Ltd & Ors*, [1999] EMLR 67. On appeal: [1999] EWCA Civ 3018. But, beyond this there is little judicial consideration in the UK of what might amount to dance. In the US the case law suggests that to be categorised as dance, the dance should have a story line. *Fuller v. Bemis*, 50 F. 926 (C.C.S.D.N.Y. 1892). *Dane v M & H Co.* 136 U.S.P.Q. 426.

<sup>61</sup> Earlier examples along similar themes would include John Cage's music and in particular the dispute over 4 minutes and 33 seconds of silence. See <http://news.bbc.co.uk/1/hi/2276621.stm> (accessed 13 Dec 2011).



Copyright Michael Alcorn 2010.

For Michael Alcorn, the heart of the work is the computer program.

So an example – a new piece which I have been working on which is being performed next week. There is ... the score is presented to the performers and the audience on the screen, on a massive big screen, so everybody can see what is going on. And I have written a computer program that controls all the objects on the screen. Quite often they behave in a random way. Sometimes they collide with one and other – there are things that I have no control over.<sup>62</sup>

So is the work the computer program? The images on the screen? The musicians responding to the images and producing the sound? Everything together? An answer would be demanded in the event that a dispute arose. The law may well carve up elements of the piece – calling, for example, the piece of software one work;<sup>63</sup> the images produced by the computer on the screen another;<sup>64</sup> and the performance by the musicians yet another.<sup>65</sup> In this respect it would seem the law might not do what the creators reasonably expect. Michael Alcorn's work may not be a musical work, and the performance of the work may attract its own copyright as an arrangement when

<sup>62</sup> Thomas/Alcorn. Michael Alcorn.

<sup>63</sup> CDPA, s 3(1)(b).

<sup>64</sup> Perhaps as a computer-generated work CDPA, s 9(3); or as an artistic work CDPA, s 4(1)(a).

<sup>65</sup> Performers' rights in the performance, and possibly the right sort of contribution to make them joint authors of the copyright in the arrangement. See below.

fixed - assuming that you can have an arrangement in the absence of an underlying composition. And what about other examples that were given to us by our interviewees such as Ocarina – the app that changes an iPhone into a flute-like instrument and which can be played singly or connect to players all over the world?<sup>66</sup> Is the sound that it produces, either singly or in conjunction with those separated in space, a musical work? What about the work by Steve Beresford and the Improvisers Orchestra?<sup>67</sup> Or Steve Beresford and Tania Chen performing ‘iPhone, Stylophone and Toy Drum Sonata’?<sup>68</sup> Would these instances meet the definition of a work for the purposes of the copyright legislation?

And what about the experiential, avant-garde types of dance? For these, it seems easier to argue that they should be classified as works for the purposes of the CDPA. What the dancers produced was certainly capable of being performed, at least by trained dancers. The dances had a story line, and were expressed in ways that went beyond what has been handed down the years in terms of dance expression (if indeed these are pre-requisites for a work of dance in the UK). Jenni Wren of Slanjayvah Danza with her partner in *Blind Passion*<sup>69</sup> and in *Crazy Joanna*<sup>70</sup> (picture shown below) provide us with good examples.



Image taken by: Aurora Fearnley, Copyright: Slanjayvah Danza 2010

So, too, do the captured images of Johan Stjernholm and Hyo Jeung Jo dancing in a performance of *All a Part of Me*.<sup>71</sup>

<sup>66</sup> [www.itunes.apple.com/gb/app/ocarina/id293053479?mt=8](http://www.itunes.apple.com/gb/app/ocarina/id293053479?mt=8) (accessed 13 Dec 2011).

<sup>67</sup> [www.youtube.com/watch?v=7AvO8\\_ZJmCc](http://www.youtube.com/watch?v=7AvO8_ZJmCc) (accessed 13 Dec 2011).

<sup>68</sup> [www.blog.taniachen.com/?m=201001](http://www.blog.taniachen.com/?m=201001) (accessed 13 Dec 2011).

<sup>69</sup> For more information see [www.slanjayvahdanza.com/en/](http://www.slanjayvahdanza.com/en/) (accessed 13 Dec 2011).

<sup>70</sup> *Ibid.*

<sup>71</sup> Photography: Daniel Katz 2008; dancers: Hyo Jeung Jo and Johan Stjernholm; costume design: t a k i s; choreography: Johan Stjernholm.



Copyright Daniel Katz 2008.

So it seems that when it comes to categorising the experiential, experimental art forms, shoehorning much of what is produced by the fields of musical practice into the relevant work category in the copyright legislation may be problematic. However, it may be prove to be less troubling for dance. The implications and significance of these differences are open to debate.

### ***3.2 The Creative Effort (Originality)***

During the development of copyright law, the focus in the latter part of the 19<sup>th</sup> century on text-based works and on economic value as the object of protection shifted attention away from the creative effort that went into the work. While a work falling into the category of music or dance under the CDPA must be original, the level of originality required is very low in the UK, where a work must not be copied,<sup>72</sup> but no more than skill, judgement or labour<sup>73</sup> needs to be expended in its creation. The skill that is expended must be relevant to the work as it is expressed, rather than to the idea behind the work which remains unprotected and unprotectable.<sup>74</sup> Such is the low level of originality required under British law that few works have been denied the status of work for want of originality.<sup>75</sup> Recent case law from the European Court of

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<sup>72</sup> *University of London Press Ltd v University Tutorial Press Ltd.*, [1916] 2 Ch 601.

<sup>73</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd.*, [1964] 1 WLR 273.

<sup>74</sup> TRIPs Agreement Article 9.2.

<sup>75</sup> Single words may not be protected – *Exxon Corporation v Exxon Insurance Consultants*, [1982] RPC 69. It had been thought that headlines were unprotected. This view may need to be re-thought in

Justice, *Infopaq*,<sup>76</sup> suggests that, through a process of harmonisation of the requirement of originality throughout Member States, the level has been raised to one of ‘intellectual creation’. Whether this makes any difference in practice to either music or dance is perhaps unlikely, given the existing levels of creativity expended in realising these works.<sup>77</sup>

It seems that the musical and dance creations constituting the subject of this study would have no difficulty in meeting this ‘raised’ standard<sup>78</sup> although, as noted, there might be interesting questions as to what amounts to the work. Equally challenging is the issue of derivative works (as opposed to musical arrangements). Music and dance are, by their very nature, derivative. New works and their constituent parts are based upon pre-existing traditions and works. In the course of our research, we have seen improvised music within the jazz tradition;<sup>79</sup> contemporary music influenced by a melee of world trends, folk, pop and jazz;<sup>80</sup> contemporary dance influenced by tango;<sup>81</sup> traditional ballet;<sup>82</sup> and traditional dance based on the Laban movement.<sup>83</sup> So would these derivative works have sufficient originality to be protected? As noted above, it is possible to have two (or more) copyrights within the same work. So, a musical composition in which copyright subsists may be copied in a second on which sufficient skill, labour and effort of the right kind (intellectual creation) may be expended in creating something different.<sup>84</sup> An example of improvised work in the jazz tradition might be the musical evenings held in Café Oto in London,<sup>85</sup> or in Carousel in Belfast,<sup>86</sup> and which, in line with the holding that copyright subsisted in an arrangement of music, would seem to exhibit the right kind of originality.<sup>87</sup> While

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the light of the recent ruling in *NLA v Meltwater*, [2010] EWHC 3099 (Ch), affirmed on appeal to the Court of Appeal in [2011] EWCA Civ 890.

<sup>76</sup> *Infopaq International A/S v Danske Dagblades Forening*, Case C-5/08, [2009] ECR I-6569 (ECJ); [2009] ECDR 16 259.

<sup>77</sup> E Derclaye, “Wonderful or Worrisome? The Impact of the ECJ Ruling in *Infopaq* on UK Copyright Law” (2010) 32(5) *European Intellectual Property Review* 248-251. J Pila, “An Intentional View of the Copyright Work” (2008) 71 *Modern Law Review* 535-558; C Handig, “*Infopaq International A/S v Danske Dagblades Forening* (C-5/08): Is the Term “Work” in the CDPA 1988 in Line With the European Directives?” (2010) 32(2) *European Intellectual Property Review* 53 - 57

<sup>78</sup> Note the legal discussion on pre-expressive labour, which tends to be irrelevant when considering originality in the final work. See C Waelde, “Database Copyright: The Story of BHB”, in P Torremans, (ed) *Copyright law: A Handbook of Contemporary Research*, (Cheltenham: Edward Elgar Publishing 2007) at 109.

<sup>79</sup> Alcorn/Beresford. Steve Beresford.

<sup>80</sup> Schlesinger/Deavin whose music can be found at [www.6dayriot.co.uk/](http://www.6dayriot.co.uk/) (accessed 12 Dec 2011).

<sup>81</sup> Jenni Wren in Crazy Joanna see note 71 above.

<sup>82</sup> Scottish Ballet [www.scottishballet.co.uk/](http://www.scottishballet.co.uk/) (accessed 13 Dec 2011).

<sup>83</sup> Johan Stjernholm see note 90 below.

<sup>84</sup> The effort created in the second work must bring to it material change *Macmillan v Cooper*, (1924) 40 TLR 186.

<sup>85</sup> Alcorn/Beresford.

<sup>86</sup> Alcorn/Beresford.



this type of improvised performance may be classed as a musical arrangement, there is ample room for discussion and argument as to where any line might lie between an infringing derivative work, an arrangement, and a completely new work that shrugs off infringement in any underlying existing composition.

Dancers, it seems, seek to situate themselves in the tradition of a certain choreographer or style of dance, or to create their own dances in their own style.<sup>88</sup> Writers on dance are of one mind in accepting that dance changes, both over time and because each dance looks different on different bodies. On the basis that the generality of dances (e.g. swing, waltz, tango) would not be protected as such,<sup>89</sup> a question might be as to the originality expended on dances in the same sub-tradition. One of our interviewees made just this point noting that echoes of existing works in new creations are unmistakable:

I certainly think that I am very much firmly rooted in the development of European Dance Theatre. Yet ... I do go well beyond that framework in some respects, and ... by doing so, ... it will develop dance as we know it... Very recently I made a very short dance ... a couple of days later I looked at some works by William Forsythe ... and I thought, "Oh my God, ... people can look at my work and say that it is just copying and that could make a fusion between Forsythe and [me]'" ... But then I thought about it, ...a fusion is also of course quite unique, and I...add my own flavour to it.<sup>90</sup>

A comparable point may be made about music, as for instance in Michael Alcorn's understanding of his creative practices:

Once you can no longer pinpoint with digital accuracy that something is yours, I think after that you have just got to assume that...I guess there is...some sort of aspect of that rather than stealing. Because it's not the first time where I find I have written something, a piece, and then you know, a couple of months later I will be looking through a score and think, "Hang on, this is where I got this idea from, you know, I thought this was entirely unique." And yet I obviously looked at this stage and it stuck somewhere in my mind. I think everyone just accepts that that happens, there is a

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<sup>87</sup> *ZYX Music GmbH v King*, [1995] 3 All ER 1 dismissed on other grounds [1997] All ER 129. See R Arnold, *Performers Rights*(4<sup>th</sup> ed) (London: Sweet and Maxwell, 2008), 53.

<sup>88</sup> Professor Sarah Whatley, Director of Media Arts and Performance at Coventry University, has published an archive of digital recordings centred on the work of the choreographer, Siobhan Davies. Analysis of the contents of this site well illustrates the point made. [www.siobhandaviesreplay.com/index.php](http://www.siobhandaviesreplay.com/index.php) (accessed 12 Dec 2011).

<sup>89</sup> The name "Tango" seems to have been used in association with the dance in the 1890s. C Denniston *The Meaning of Tango: The Story of the Argentinian Dance* (London: Portco Books, 2007). Note the Tango influences on the work of Jenni Wren in *Crazy Joanna* see above note 71.

<sup>90</sup> Dancers' focus group. Johan Stjernholm.

certain amount of reconstruction with everybody else's work all the time.<sup>91</sup>

In short, the reworking of existing works in the creation of new ones is simply a normal part of much cultural production.

### 3.3. *Fixation*

A key requirement for copyright to subsist in a musical or dramatic work is that it be fixed in some material form. The work can exist prior to fixation, but copyright only arises on fixation. What form fixation takes is left open in the current legislation and needs only to be “in writing or otherwise”.<sup>92</sup> Traditionally fixation has been thought of as being in writing, reflecting the historical text-based roots of copyright law. Fixation for music would be in the form of the score, a practice that began before the 15<sup>th</sup> century when notes were hand-written and bound in manuscripts. This practice may now contribute to claims of ownership over particular aspects of the work.<sup>93</sup> For dance, and as discussed above, one of the notation systems such as Laban or Benesh might be deployed, both of which have more modern origins, having been invented in the mid 20<sup>th</sup> century. Traditionally, it seems the purpose of fixation for both art forms was to enable the work to be recorded and re-performed, and not primarily it would seem, for claims of copyright.<sup>94</sup> For dance, for instance, it was felt that much was being ‘lost’ because of the absence of a system.

The lack of any reliable and generally accessible way of recording dance has given it a fugitive nature. It has rendered dances unstable, depending on generations of dancers whose uncertain memories are associated with their own styles and body habits. It has also made dance hard to study, because knowledge of specific dances cannot be widely diffused; very few people can grasp from their own experience the range of the art or arts of dance, even in their own time.<sup>95</sup>

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<sup>91</sup> Alcorn/Beresford. Michael Alcorn.

<sup>92</sup> CDPA, s 3(2).

<sup>93</sup> L Bently, “Authorship of Popular Music in UK Copyright Law” (2009) 12(2) *Information, Communication & Society* 179-204, at 187 remarks that while: “notation/the capacity to be notated is not a prerequisite for something to be regarded as a musical work, there is no doubt that the fact that certain forms of sound are regularly notated renders them more readily regarded as musical”.

<sup>94</sup> Although some argue that Laban claimed ownership of the system he used, it is unclear that this assertion was made in the legal copyright sense. Rather, it would seem that the more widely accepted view is that he felt the system necessary because he wanted recordings from which his dances could be preserved and from which others could learn the underlying philosophical principles of movement. J Hodgson, *Mastering movement: the Life and Work of Rudolf Laban* (New York: Methuen, 2001).

<sup>95</sup> F Sparshott, *A Measured Pace: Toward a Philosophical Understanding of the Arts of Dance*, (Toronto: University of Toronto Press, 1995), at 420.

Digital recording seems now to be the favoured means of capturing dance performance, although this, in turn, appears to be in order to preserve the authenticity of the dance and for educational purposes rather than, overtly, as a property claim.<sup>96</sup>

The means of capture and what is captured are important. Those involved see their input as making a major contribution to the creative process and in line with the aesthetic norms of their particular milieu:

Working in film, when I am working with dancers or musicians or anyone, you never think about the audience when it comes to producing the product – we always make something that we want to watch, which is quite different, I think, to an actual live kind of process. The product that we try and produce on film is something that comes from our creative idea of what we want it to look like, without ever really taking into account who is going to watch it. And that is...how we have become successful,...by not thinking about what people want – but thinking about what we want to make, which is quite different.<sup>97</sup>

If recorded music or dance is to be preserved and perhaps to find a market, the recording needs to be of high quality. This requires both creative effort (as above) and resources which are available only to relatively few.<sup>98</sup> One such organisation set up to make recordings of contemporary classical music is NMC Recordings.<sup>99</sup> It is reliant on charitable donations and royalty streams that will cease once the term of copyright in the underlying work expires.<sup>100</sup> That means that continued production is vulnerable. Even where recordings are made, problems can arise with obtaining the consent of representatives of the musicians and performers, particularly in the larger organisations. It appears there is a fear that when the recordings are made available in secondary markets, there will be inequitable sharing of royalty streams. For dance, this factor has precluded the recording of performances that might have found a secondary market.<sup>101</sup> These factors combine to mean that much of our contemporary output in music and dance is available to only the very small audience able to experience the performance first hand. Now, while it will be argued below that there is much in these performances that defies fixation, the fact that recordings are not widely available means that audiences have less exposure to the works in question. This, in turn, may make them less readily understood and thus less attractive for many.

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<sup>96</sup> Schlesinger/Sughrue. Alcorn/Beresford.

<sup>97</sup> Dancers' focus group. Aurora Fearnley.

<sup>98</sup> Some of organisations recording classical music are subsidised by other activities. Nonesuch for instance is owned by Warner Music Group; Naxos has several imprints and records different genres including Chinese music and Jazz.

<sup>99</sup> A charity "passionate about making the best of today's British classical music available to international audiences, permanently" available at <http://www.nmcrec.co.uk/> (accessed 12 Dec 2011).

<sup>100</sup> Interview with Hannah Vleck of NMC on 10 Mar 2010. Waelde/Vleck.

<sup>101</sup> Schlesinger/Sughrue. Cindy Sughrue.

### 3.4 *What is Beyond Fixation?*

There is much in the experiential, experimental forms of dance that is beyond fixation – a theme that comes through in the literature and our interviews.

Whatley recognises that “The ephemerality of dance means that it is the most difficult of the performing arts to substitute with a hard copy recording”.<sup>102</sup> Meskin has described the challenges of capturing dance on film thus:

Video and film recordings of dance performances, however, do not allow us access to those dance performances. We do not see dance performances when we look at video or film; we see representations of them. The video and film media are not transparent since they do not present us with the first-person spatial information that is essential to vision. With dance this means that important spatial information, and spatial experience (for example, the experience of having the dancers move towards you), ...is missing?<sup>103</sup>

There is much about the audience’s experience of dance that arises both in the literature and from our interviews. A key aspect is the involvement of the watcher in the dance, as summed up by Pakes: “...dance as an art form that...involves both matter and consciousness.”<sup>104</sup>

In relation to traditional ballet, Scottish Ballet’s Cindy Sughrue told us:

Our starting point is always wanting to make exciting work, that people feel ... moved, thrilled, energised or furious about, you know, get some reaction to it. And I think that ballet, as a form, has one of the greatest possibilities to try new things, because there is music, there is visual art, there is design ... It’s a total theatre experience. And therefore, for us to be finding new approaches, and in no way being seduced by either a passing fad or new technology for the sake of it, but if you can harness that to create something that takes the art form to another level, then we absolutely have to be doing that.<sup>105</sup>

In the literature, Pakes considers these themes further:

...the significance and value of dance seem to rest at least partly on the phenomenal experiences of dancers and audiences: on the way it feels to perform or witness a leap, lunge or fall to the floor, on

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<sup>102</sup> S Whatley, ‘Dance Identity, Authenticity and Issues of Interpretation with Specific Reference to the Choreography of Siobhan Davies’ (2005) 23(2) *Dance Research: The Journal of the Society for Dance Research* 87-105, at 89.

<sup>103</sup> J Meskin, ‘Productions, Performances, and Their Evaluations’ in G McFee (ed), *Dance, Education, and Philosophy* (Oxford: Meyer & Meyer, 1999) at 46.

<sup>104</sup> A Pakes, ‘Dance’s Mind-Body Problem’ (2006) 24(2) *Dance Research* 87-104, at 99.

<sup>105</sup> Schlesinger/Sughrue.

what it is like to confront the physical presence of dancers or audience members, or follow a phrase or movement from its initiation to completion.<sup>106</sup>

In an interview, Johan Stjernholm also considered the difficulty of fixing the experience;

...it has to do with a direct interaction between audience and performer, where the audience actually also become performers and performers audience – yes, I think it would be very difficult to get that experience on a video or anything.<sup>107</sup>

Of our interviewees, Jenni Wren offered the most powerful example of the relations between performer and audience:

...when we had a showing of *Blind Passion*, a severely visually impaired woman came to watch it, and the best comment I have ever had is, she said, “I can’t see it, but oh my God, I can feel it”.  
...It was a really beautiful thing to hear.

We leave it open as to whether similar things could be said about music. From the evidence of the present study, however, it would seem that fewer dimensions of the musical experience cannot be captured by fixation. Consequently, what is said about this question tends to focus on the performative aspects of music. Théberge for instance argues:

...copyright law valorised composition...over performance as a form of musical practice. ...this...was perhaps understandable, given that performance, ephemeral in nature and lacking a means of fixation and reproduction, did not lend itself to the evolving economic system based on fixed commodities and exclusive property rights.<sup>108</sup>

Our interviewees tended to focus on what drew people to watch live performances, rather than what could not be captured. So in discussion, Daniel Deavin and Tamara Schlesinger noted the importance of:

...enthusiasm...we always try and interact with the crowd and... make the recording as enjoyable and energetic when it is live as possible...I think that is the bigger difference...I think when you

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<sup>106</sup> A Pakes, “Dance's Mind-Body Problem” (2006) 24(2) *Dance Research* 87-104, at 90.

<sup>107</sup> Dancers’ focus group. Johan Stjernholm.

<sup>108</sup> P Théberge, “Technology Creative Practice and Copyright”, in S Frith and L Marshall (eds) *Music and Copyright* (2<sup>nd</sup> ed) (Edinburgh: Edinburgh University Press 2004) 139-156, at 140. See also J Toynbee, “Musicians” in *Music and Copyright* 123-138, at 130 “...Choir is a composition-in-performance, with James Newton’s score inevitably being a mere shadow of the realised work. In its focus on notation, copyright law fails to do the very thing it promises, namely to protect creators and their creativity.”

have got people in front of you...you probably get a bit more raucous, a bit more uplifting. And we change some of the arrangements sometimes, to make them a little bit more...crowd friendly, so we can allow some singing from the crowd, interaction, that sort of thing. And it works really well – we always get great responses.<sup>109</sup>

Such comments underline the fact that live performance is interactive, feeding on the audience's receptiveness while at the same time attempting to shape responses.

### 3.5 *Authorship*

This brings us to the question of authorship. Even when it has been decided that a work exists for the purpose of copyright law, that the correct originality has been expended in its creation, and that it is fixed and is therefore protected by copyright, pressing questions can, and do, crop up over 'who is the author' or 'who are the authors' of the work. These have arisen most notably in the music sector, often many years after a work has been created and made available, the catalyst being financial success. In the absence of agreement, who the law considers is the author of the work matters because ownership follows authorship,<sup>110</sup> and with ownership comes the right to share in royalty streams.<sup>111</sup>

#### 3.5.1 *Music*

Case law shows that authorship is attributed in a musical work sometimes in surprising ways. Ex post facto a court is required to pick over a musical piece to determine who has made the right kind of contribution necessary to be considered a co-author. In *Hadley v Kemp*,<sup>112</sup> the court held that there was a distinction between the composition or creation of a musical work, and its interpretation or performance. Only the composition or creation resulted in authorship of the work because performance – including in this case saxophone improvisations - was just that, performance. There are yet other elements of musical performance which remain

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<sup>109</sup> Schlesinger/Deavin. Tamara Schlesinger.

<sup>110</sup> CDPA, s 9 (1) "In this Part 'author', in relation to a work, means the person who creates it." S 11(1) "The author of a work is the first owner of any copyright in it, subject to the following provisions. (2) Where a literary, dramatic, musical or artistic work, or a film is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary."

<sup>111</sup> PRS for Music licences the copyright in these works on behalf of the owners and collects and distributes royalties – known as publishing royalties. Payments to the record company arise when copies of the recording are made, and to the owner of the copyright in the music (the composer and the songwriter) when a work is played or communicated in public. The share of the royalties payable to the composer and songwriter can be quite large and as a result, as Bently notes "a songwriter in a successful band can end up significantly more wealthy than the non-songwriting members." L Bently, "Authorship of Popular Music in UK Copyright Law" (2009) 12(2) *Information, Communication & Society* 179-204, at 189.

<sup>112</sup> *Hadley v Kemp*, [1999] E.M.L.R. 589 (Ch D)

outside the scope of copyright.<sup>113</sup> So, in *Coffey v Warner/Chappell Music Ltd*,<sup>114</sup> Coffey claimed that Madonna had infringed copyright in parts of the song “Forever After”, in particular the vocal expression, pitch, contour and syncopation surrounding the words “does it really matter”, that were repeated throughout the song. The court found that features of timbre, pitch contour and stress “appertain to interpretation and performance characteristics by the performer, which is not the legitimate subject of copyright protection in the case of a musical work, rather than to a composition, which is”.<sup>115</sup> So, and as with Hadley, the performative elements in these cases were not seen as worthy of protection by copyright.<sup>116</sup> Later cases have been more open to recognising what some might consider performative elements as worthy of copyright protection. In *Fisher v Booker*<sup>117</sup> the question was whether Fisher was a joint author for copyright purposes of organ elements of Procul Harum. If

... the contribution of the individual band member to the overall work is both significant (in the sense that it is more than merely trivial) and original (in the sense that it is the product of skill and labour in its creation) and the resulting work is recorded (whether in writing or otherwise), that band member is entitled to copyright in the work as one of its joint authors and to any composing royalties that follow.<sup>118</sup>

This approach by the courts seems much more suited to recognising the collaborative, performative nature of contemporary music making and of the collective labour, skill and effort (or intellectual creation) expended in the realisation of a work and, relatedly, the way the participants organise their own affairs. Steve Beresford, for instance, explains how all of the contributors to an improvised event “sign the PRS form.”<sup>119</sup> So all would, in due course, share in any secondary revenue stream. Likewise, Tamara Schlesinger and Daniel Deavin explain how the income from performances by 6 Day Riot is shared between band members.<sup>120</sup> Whether all contributions to contemporary music *should* be protected by copyright or whether other forms of protection might be preferable is another matter and will be considered below.

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<sup>113</sup> The result has been questioned by Richard Arnold, “Are Performers Authors? *Hadley v Kemp*,” (1999) 21(9) *European Intellectual Property Review* 464-469. See also “The Myth of the Auteur: Performers as Authors” [2000] *Yearbook of Copyright & Media Law* 3-14 ; and R Arnold, *Performers' Rights*, (4<sup>th</sup> ed) (London: Sweet & Maxwell, 2008), paras 10.02 to 10.32.

<sup>114</sup> *Coffey v Warner/Chappell Music Ltd.*, [2005] EWHC 449 (Ch); [2005] E.C.D.R. 21.

<sup>115</sup> *Ibid.* para 6.

<sup>116</sup> Note that some contest that this should be the case. See R Arnold, “Reflections on ‘The Triumph of Music’: Copyrights and Performers' Rights in Music” 2010 *Intellectual Property Quarterly* 153 -164.

<sup>117</sup> *Fisher v Booker*, [2006] EWHC 3239 (Ch); [2007] E.M.L.R. 9 (Ch D). See also *Beckingham v Hodgins*, [2002] EWHC 2143 (Ch); *Stuart v Barratt & Others*, [1994] EMLR 448; *Bamgboye v Reed*, [2004] EMLR (5) 61.

<sup>118</sup> *Fisher v Booker* *ibid* para 46.

<sup>119</sup> Alcorn/Beresford. Steve Beresford.

<sup>120</sup> Schlesinger/Deavin.

### 3.5.2. *Dance*

For dance, there is no case law on authorship in the UK. The legislation simply states that the author is the person who creates the work.<sup>121</sup> But, for dance, who is that? There is a widely held view that it is the choreographer. In an interview, Helen Thomas said of one choreographer that she "...thinks that the concept, her original idea, is the most important thing, rather than necessarily the expression of it in the performance...."<sup>122</sup> Following this line of argument, the choreographer would be considered to be the author (and owner) of the copyright. This view is amplified in a further comment by Helen Thomas concerning Siobhan Davis, a well-known contemporary choreographer: "And you can see that she works beautifully with them to ensure that their individuality is expressed and seen through the performance. But in the final analysis, it's the Siobhan Davies Dance Company and it's her work".<sup>123</sup>

Occasionally others become involved in creating a ballet. For instance a choreographer might work with a dramaturg on narrative pieces to help with the storytelling. Cindy Sughrue told us about their production (spring 2012) of *A Streetcar Named Desire* in which the director is working with the choreographer:

...the director, even though she will be conceiving it, it is her concept and her construct, it will actually be the choreographer who is delivering the steps, because it will be movement led. So, the choreographer will be the one who actually puts the most time and work into it, and will be working in the studio with the dancers in a way that the director will come in and observe what is happening and give it some focus or challenge things, but...won't be driving the content as much as shaping it.<sup>124</sup>

There is also much discussion and diverse opinion as to the place and role of the dancer in the creative process. Is the dancer an object through which the dance is realised? Or is she a catalyst, central to the realisation of the dance? Is her contribution through her performance of the right kind to make her an author (or *the* author) of the copyright in the dance? Or is her contribution 'just' one of performance, giving her performers' rights but not copyright? Reflecting the unsettled nature of these questions, Geraldine Morris has noted that "for some choreographers the dancer is little more than an object, a neutral body to be fitted into a pre-arranged pattern of steps. For others, the dancer is the catalyst whose presence stimulates the creation of the dance."<sup>125</sup>

Evidently, choreographers view dancers in very different ways. Some – rarely – think of the work as co-created; some accord developmental space to dancers; and others look to their interests defensively, as is illustrated by the following quotations:

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<sup>121</sup> CDPA, s 9(1)

<sup>122</sup> Thomas/Alcorn. Helen Thomas.

<sup>123</sup> *Ibid.*

<sup>124</sup> Schlesinger/Sughrue. Cindy Sughrue.

<sup>125</sup> G Morris, "Dance Partnerships: Ashton and his dancers", (2001) 19(1) *Dance Research* 11-59, at 11.



For Jenni Wren, the process was very much a collaborative one:

I find it quite simple because in dance it's more like the work that you produce is like a commission – everything is brought in like a commission to produce work, to ask the concept to move forward, and everybody ... I never say 'solely choreographed by Jenni Wren', 'concept by Jenni Wren – choreographed in collaboration with dancers', because I task my dancers greatly, I will give them movement that they then have to put onto their bodies and work with their bodies to do that through their bodies. So you can't take ownership, and they can't take ownership because they are working under your direction. So it has to be a joint ownership. The only ownership really, and that they know contractually, it is a property, if anything, under the name of the company, which doesn't even belong to me. It doesn't actually belong to anyone.<sup>126</sup>

In Sarah Whately's analysis of Siobhan Davies' practice, the underlying approach is different again:

Davies' choreographic method invites dancers to bring their personal qualities to the dance, to encourage each individual to find convincing 'real' movement that they own, rather than having movement imposed upon them. The dancers are thus encouraged to contribute to how the dance emerges, the shape and the meaning.<sup>127</sup>

Others, however, are clear that the work is by right the choreographer's, who therefore has something to defend: "[T]he choreographer is glued immobile as a fly in a web and must watch his own pupils and assistants, suborned to steal his ideas and livelihood. Several dancers made paying careers out of doing just this".<sup>128</sup>

Whatever the particular approach taken to rights, it is important to recognise the consequences of dance being an embodied practice,

...it will look different on different bodies...and that is because... it's obviously a live art form, but it is also something where...there is a certain degree of fluctuation in terms of tuning, ..., you...have a clarinet concerto that will sound like that because you are using the similar instrument, as opposed to putting something on a different body and it can look quite different, or have a different dynamic. Or you can have a duet, you know, the Romeo and Juliet balcony duet, and it will look ... very different between one couple and another because of their different physiques and their proportionate sizes and so on. But what you also see is things will change over time –

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<sup>126</sup> Dancers' focus group. Jenni Wren.

<sup>127</sup> S Whatley, "Dance Identity, Authenticity and Issues of Interpretation with Specific Reference to the Choreography of Siobhan Davies" (2005) 23(2) *Dance Research* 87 -105, at 91.

<sup>128</sup> A De Mille, *And Promenade Home*, (Boston, Toronto: Little, Brown and Company, 1956), at 256.

and where a choreographer is still alive and working with a company, you will often see things done a little bit differently.<sup>129</sup>

Analysing these processes and the views of those engaged in dance through a legal lens, it would seem that for copyright purposes authorship could reside not only with the choreographer, but also with the dancer. It seems that there is much skill, labour and effort, and intellectual creation even more so, expended by the dancer, and it should be of the right kind as it contributes to the expression of the dance. While it is certainly the case that some dances are more directed by the choreographer than others, there will be many choices and means of expressing the dance that are added by the dancer. If it was thought that extra layers of copyright would be advantageous in the dance industry then it seems that there would be strong arguments for a distinction in dance similar to the distinction in music between composition and arrangement. For dance, it may be choreography and realisation with dancers having the status of (joint) copyright authors.

#### 4. Performers' Rights and Copyright

Copyright does protect the experiential, experimental forms of music and dance once those are fixed, albeit that there is much about the performative elements that resists fixation. But we have seen through our interviewees that the copyright system as it currently stands does not reflect practice. The rights conferred seem not to give an incentive to produce or perform: our interviewees generally knew they existed, but certainly did not know the detail. The fact of their existence was not the driver for creation: that was personal commitment to an art form and the desire for self-realisation. While this accords with the 'romantic' conception of creative work, it was nonetheless a key element in the self-descriptions of our interviewees.<sup>130</sup> Of course, such understandings are also traded off against the need to make a living but that does not mean that they do not exist, nor should we suppose that they are not potent motivating forces. It is perhaps not surprising that, when exercised, copyright tends not to be used in the way that the law envisages and when imposed on complex cultures of practice may produce results that are unexpected.

So, if copyright is not well suited to protect innovative forms of music and dance, might performers' rights serve the artists' interests better? Performers' rights have an uneven history. With only limited protection at international level<sup>131</sup> as compared with copyright, performers rights in the UK have only been recognised in statute comparatively recently. There have long been policy difficulties in recognising the contributions of performers,<sup>132</sup> based on the fear that over strong rights for performers would inhibit the exploitation of the underlying work. The majority of countries protect performers and performances where the performance is the realisation of an

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<sup>129</sup> Schlesinger/Sughrue. Cindy Sughrue.

<sup>130</sup> K Negus and M Pickering, *Creativity, Communication and Cultural Value* (London: SAGE, 2004) at ch 7 *passim*.

<sup>131</sup> See note 3 above.

<sup>132</sup> See R Arnold, *Performers' Rights* (4<sup>th</sup> ed) (London: Sweet and Maxwell 2008).

underlying work that is already protected by copyright.<sup>133</sup> for instance, an actor interpreting the work of a playwright; or a dancer interpreting the work of a choreographer where the dance has been notated. The UK is different in that the CDPA states that performers' rights may exist in a dramatic or musical performance – but without limiting the definition to the performance of a work.<sup>134</sup> So performers of improvised, *ex tempore*, unscripted musical and dance performances would also have performers' rights.<sup>135</sup>

The main rights that performers' receive are the right to consent to the fixation of a performance, and thereafter the right to consent to making the performance available through being played or shown in public or communicated to the public.<sup>136</sup> Much of the contemporary music and dance discussed above is developed through performance and is not the performance of a pre-existing work, so the individuals would be protected by performers' rights whether the performance is fixed or not and whether or not it is also a work which may be protected by copyright once fixed.

#### 4.1 *Creative Spaces*

One of the key differences between copyright and performers rights is that performers' rights give protection only against the copying of the recording itself, and not against imitation of the performance.<sup>137</sup> This is in contrast with copyright where the taking of a substantial part evaluated either qualitatively or quantitatively may infringe<sup>138</sup> and the part taken may not exactly resemble the original in any way.<sup>139</sup> This means that with the expansive scope of protection of copyright comes more limited space for creating afresh. As discussed above, music and dance are both highly derivative – necessarily so. There are only a limited number of notes and sounds an instrument can make. A body has limitations and cannot be pushed beyond the boundaries of its physical form. New works necessarily build on existing ones. There is of course room for many choices within that:

I was trying to explain once to a group of children why music composition is so difficult...An example I gave was if you are

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<sup>133</sup> Ad hoc informal meeting on the protection of Audiovisual performances Geneva, November 6 and 7, 2003. Study on audiovisual performers' contracts and remuneration practices in Mexico, the United Kingdom and the United States of America. Katherine M Sand. WIPO Paper AVP/IM/03/3A.

<sup>134</sup> CDPA, s 180(2) “‘performance’ means (a) a dramatic performance (which includes dance and mime),

(b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation.”

<sup>135</sup> There are other requirements. CDPA, s 181 “A performance is a qualifying performance for the purposes of the provisions of this Part relating to performers' rights if it is given by a qualifying individual (as defined in section 206) or takes place in a qualifying country (as so defined).”

<sup>136</sup> CDPA, s 182.

<sup>137</sup> Another is the term of protection. See above note 6.

<sup>138</sup> See above note 7.

<sup>139</sup> *Designers Guild Limited v Russell Williams (Textiles) Limited*, [2001] 1 WLR 2416.

writing a piece for cello you choose the first note...There is something like 150,000 possibilities for what the second note can be, and then that is multiplied by two again for the second note and so on. And so all of this is about making choices.<sup>140</sup>

When considering the size of creative spaces in copyright, sampling in music provides a useful example.<sup>141</sup> Some have argued that such small pieces of music are taken when sampling that would not amount to infringement, although some case law suggests otherwise.<sup>142</sup> Other commentators have gone so far as to argue that copyright is not an issue for sampling, rather what is needed is an efficient licensing scheme so that sampled notes of music can be used.<sup>143</sup> Others go further and say that the licensing system should be a compulsory one, meaning the taker can take without asking so long as payment is made.<sup>144</sup> In all of this, it should be remembered that the fact that copyright could subsist in such small samples encourages many of the rights-holders to pursue those who take without asking. In this, the smaller entity will almost inevitably be the user and will either have to pay for the use of the sample, or to turn elsewhere. While it cannot be argued that the payment of money per se cramps creativity, it is somewhat unlikely that all musicians with few resources may actively use the samples they would like in new productions. If other elements of musical performance – such as voice and gesture – also become subsumed under the copyright banner, it cannot but be more difficult for those in the business to create afresh, not least if they always worry whether what they do might be ‘too close’ to an existing work. It seems in practice that many musicians are aware that they take from, or are influenced by, others: “We play alternative folk pop music ... Lots of world music influences, catchy, poppy melodies, and it is all on our own record label.”<sup>145</sup> and are not worried if others take from them: “I wouldn’t worry so much, say if somebody took part of an orchestral or chamber-music piece of mine and decided to sample it, because that really isn’t the work – for me the work is something else, it’s the piece itself.”<sup>146</sup>

For dance, it seems that questions over the size of takings during the creative process do not arise, or at least questions have never reached the courts in England or Scotland. We have been told that there is a high degree of trust in the dance

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<sup>140</sup> Thomas/Alcorn. Michael Alcorn.

<sup>141</sup> L Bently, “Sampling and Copyright: Is the Law on the Right Track?” Part 1(1989) *Journal of Business Law* 113-125; Part 2 (1989) *Journal of Business Law*, 405-413. B Sherman and L Bently, “C ultures of Copying: Digital Sampling and Copyright Law”, (1992) *Entertainment Law Review* 3(5), 158-163. K. McLeod and P DiCola *Creative License: The Law and Culture of Digital Sampling* (Duke University Press 2011).

<sup>142</sup> *Lawson v Dundas* The Times, 13 June 1985 in which it was held that the four-note theme tune used by Channel 4 was protected by copyright.

<sup>143</sup> Bently above at 142.

<sup>144</sup> J Toynbee, “Musicians” in S Frith and L Marshall (eds) *Music and Copyright* (2<sup>nd</sup> ed) (Edinburgh: Edinburgh University Press 2004) 123-138, at 135.

<sup>145</sup> Schlesinger/Deavin. Tamara Schlesinger.

<sup>146</sup> Alcorn/Beresford. Michael Alcorn.

industry.<sup>147</sup> Dances are created and recreated. When Scottish Ballet mounts a large (and expensive) production, all of the elements can be made available for licence to other companies: the choreography; the set; the costumes; the lighting. Other dancers and companies situate themselves within the tradition of a particular choreographer and borrow from and build upon that particular style of dance – but not, apparently, to the extent that payment becomes due to the owner of the copyright. What is often important, it seems, is the audience experience of how a particular choreographer has developed a ballet and how that is interpreted through a particular dancer playing a particular role, rather than for the dancer herself: “... Darcey [Bussell] would be a key performer, but [she] is not really considered...They go to see her because she is in *Giselle* or whatever. So they will look and see how she interprets *Giselle*...”<sup>148</sup>

Moving from the dancer to the choreographer, as Johan Stjernholm has noted above, whereas the creators of dance works are influenced by what exists, they may consider their contribution to be a ‘fusion’, shaped by, but not copying what comes before.<sup>149</sup>

Again, if all of these elements of performance, which look so different on different bodies, and are interpreted through the eyes of different choreographers, were protectable and protected, how challenging the production of new dance would become. An analogy would be with the interpretation of an historical novel:

We would have to hold that Mr. Charles Laughton, for instance, could claim the right to forbid anyone else from imitating his creative mannerisms in his famous characterization of Henry VIII, or Sir Laurence Olivier could prohibit anyone else from adopting some of the innovations which he brought to the performance of *Hamlet*.<sup>150</sup>

What is done in practice for both music and dance in the areas we studied seems much closer to being within the scope of protection accorded by performers’ rights than of copyright. Indeed, when rigidly enforced the application of copyright might actively inhibit creation in these areas.

#### **4.2. Revenue streams**

It would seem *not* to be preferable to have protection through performers’ right when it comes to secondary royalty streams on exploitation, although these were largely irrelevant for our interviewees. Copyright owners receive the largest share of royalties when a work is played or communicated in public, much larger than the royalties received by the performer.<sup>151</sup> These come from PPL<sup>152</sup> and arise when a sound recording is played or

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<sup>147</sup> Schlesinger/Sughrue. Cindy Sughrue.

<sup>148</sup> Thomas/Alcorn. Helen Thomas.

<sup>149</sup> See note 90 above.

<sup>150</sup> *Supreme Records, Inc. v. Decca Records, Inc.* 90 F.Supp. 904 (1950) 909. P Auslander, “Legally Live: Performance in/of the Law” [1997] 41(2) *TDR: Journal of Performance Studies* 9-29, at 11.

<sup>151</sup> Bently, see note 111 above.

communicated in public, and from the record company on sales of a recording.<sup>153</sup> As equitable remuneration only arises in relation to sound recordings, the interests of audiovisual performers – including dancers and ‘performance musicians’ - are by contrast poorly served.<sup>154</sup> Even where it might be possible to obtain some secondary revenue, it seems that the current performers’ framework, and the means by which negotiations for exploitation of fixed performances are carried out, can operate to inhibit the making available of recorded performances where expectations of income, both in terms of what might be immediately payable, and also the size of the revenue stream that may be generated over time, are overly high. Cindy Sughrue, when asked how many copies of recordings of ballets were produced and sold by the Scottish Ballet, replied that they had sold none.

“It’s getting rights, it’s prohibitively expensive, because of the union agreements in place. So we deal with three unions – Equity, the MU [Musicians’ Union], and BECTU. And because of national agreements in place for recording, either for broadcast or for DVD sale or whatever, it is prohibitively expensive.”<sup>155</sup>

Some welcome the fact that such further forms of rights exploitation are blocked for practical reasons. For one, Helen Thomas has argued against the increasing commodification of performance, whether through performers’ rights or copyright:

“In an increasingly commodified and bureaucratised system of exchange, intellectual property rights are progressively mapping on to the agenda of contemporary performance practices. A work of dance is neither fixed in performance nor in writing. ...[T]he construct of tradition with which I would want to work, is one that lives and breathes through embodied textual practice (on or off the stage) not one that is locked up in ‘performance museums’.”<sup>156</sup>

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<sup>152</sup> [www.ppluk.com/](http://www.ppluk.com/) (accessed 13 Dec 2011) “PPL is the music licensing company which, on behalf of 45,000 performers and 5,750 record companies, licenses the use of recorded music in the UK”.

<sup>153</sup> The first is the right for the performer to claim equitable remuneration where a commercially published sound recording of a performance (but not a film) is played in public or communicated to the public otherwise than by being made available to the public mentioned in s 182CA(1), then the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording. CDPA, s 182D. The second is a right to equitable remuneration where the performer transfers (or is presumed to transfer) her rental right in a film or sound recording to the producer thereof CDPA, ss 191 F – H.

<sup>154</sup> WIPO has for a number of years been trying to negotiate a treaty that would expand the rights for audiovisual performers. Attempts have so far proved fruitless – although it is understood that the issue is back on the agenda. See [http://www.wipo.int/copyright/en/activities/audio\\_visual.html](http://www.wipo.int/copyright/en/activities/audio_visual.html) (accessed 13 Dec 2011).

<sup>155</sup> Schlesinger/Sughrue. Cindy Sughrue.

<sup>156</sup> H Thomas, “Dance History: Reconstruction and Dance as Embodied Textual Practice”, in A Carter (ed.), *Rethinking Dance History: A Reader* (London and New York: Routledge, 2004) 32-45.

As we have already noted, much work does evidently escape fixation. This does have mixed consequences, given the accompanying trade-off between making money and realising a cherished creative project.

## 5. Project findings

One of our key concerns in carrying out this research was to find what it is in the experimental, experiential forms of music and dance that defies fixation and thus copyright protection – or more broadly, institutionalisation. We have found that in dance there is much about both the process and the performance that our interviewees think cannot be captured. For music, the process is also crucial. A key issue is to find something ‘extra’ that will draw a live audience. Because of a lack of resources, there is much contemporary music and dance that will not be captured, as it lacks a market. Once a work is captured, then if it is of a recognised kind, it will be accorded copyright protection. A performer, on the other hand, is recognised as a performer in the absence of a performance being fixed – although remuneration for exploitation in secondary markets can only arise once fixed. The looser parameters of the right accorded to performers, both unfixed and once fixed, which protects only the fixation itself and not the underlying performance against copying, seems much more suited to our music and dance subcultures than does copyright with its expansive property right. The drawback, as has been noted, is that performers’ income streams in respect of a performance are significantly lower by comparison with copyright owners’. As suggested in the introduction, these factors make policy intervention challenging. Current policy focuses on the fixed work and performance, ascribing property rights in these, rights which are then exploited in the market. But where these rights are used, they do not tend to be used in the way necessarily envisaged by the legislation. Take the example cited above of “we all sign the PRS form”, reflecting the collective nature of the endeavour – something the law as currently conceived finds it difficult to deal with and in line with which rights would no doubt be apportioned differently.

While all of our interviewees would have liked to make a living exclusively through their work, the collaborative approach taken to dealing with intellectual property rights at this level no doubt reflects the limited expectation of realising this ambition.<sup>157</sup> Given that, the desire to realise creative work under often adverse conditions was strong, this pushed discussion beyond the narrowly conventional parameters that are exclusively concerned with global competitiveness and the national economy. For instance, one participant in our research suggested that we re-think what is meant by success in the creative sector.

“Perhaps our society has to kind of take a wee look at itself and re-measure what it means by success as well. There is a tendency in the 21<sup>st</sup> century for success to only be applied to things that sell massively, or draw massive crowds and so on, and you know, that kind of thing only happens to a very small percentage of the people

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<sup>157</sup> We sought in some interviews to find out how much money from exploitation it would take for the interviewees to formalise their relationships with their co-artists. All found it very hard to say as they had not thought about it – such was the low expectation of making a living from the work. Dancers’ focus group. Fiona Geilinger.

who are actually participating, and yet, it wouldn't happen to anybody if there weren't that many other people participating elsewhere, if you know what I mean?"<sup>158</sup>

This challenge may be linked to the development of a broader understanding and appreciation of what cultural creativity can contribute to society, such as for instance, contributing other goods than those directly concerned with the economic success of individuals, enterprises and the national economy, such as increased health and well-being through dance or performance.<sup>159</sup>

On an individual level, our interviewees generally live in a culture of precarious production. The overwhelming majority had 'portfolio careers'. In other words, they could not live by their art alone, but rather had to seek out other income streams. These included commercial work for third parties and, rather often, teaching. Public funding (e.g. via various arts agencies) was important for survival, although the constant need to fill application forms and justify the works could detract from the production of the work and this was not seen as a long-term strategy, more of an occasional help for a specific project.<sup>160</sup>

Various practical ideas were offered that might help to increase the visibility of the art forms. For dance the desire for more – and more diverse - criticism was strong:

"...the history of dance criticism is not anywhere at the same level as theatre criticism, or indeed music criticism. You just have to look at the Sunday Times – there is a little bit on dance and there is this huge thing on film and everything else. ....In America there is a much stronger tradition of dance criticism, which has come through the newspapers, through John Martin in the 1930s and really kind of harnessing modern dance, American modern dance, taking people up like Graham and Humphrey, and really pushing them to the fore, coupled with...musicians who would work with them and the artists who would play with them..."<sup>161</sup>

"...you get the 5 stars, and it's whatever, amazing, show-stopping little paragraph, and then on the other side it's like you have academic dance – and there is this kind of hole in the middle, whereas you are much more likely to write really quite a textured criticism of theatre work or a book, or even a visual art exhibition. And so yes, I am really interested in trying to find a way, trying to test out new mediums for something in between... informed and valued and would be read – I think maybe there is some sort of assumption that it wouldn't, I don't know. Much of the dance criticism in Dublin/Ireland is done by the theatre critics, and so they

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<sup>158</sup> Schlesinger/Noakes. Rab Noakes. Similarly, dancers' focus group. Mary Kate Connolly.

<sup>159</sup> *Ibid.*

<sup>160</sup> Dancers' focus group generally.

<sup>161</sup> Dancers' focus group. Helen Thomas.



evaluate it on a theatrical basis, which will often produce quite an unsatisfactory result. I mean I think there are some great critics in the UK, but as you say, it is very limited. And you don't have that expectation, like in the States, where it is very much talked about and read about."<sup>162</sup>

A similar dissatisfaction was articulated for how improvised music was handled, whether in criticism, or in arts programming:

"Look at...in The Guardian. Boy, his favourite word is rebarbative. I actually wrote to The Guardian and said "Has somebody counted the number of times...uses the word 'rebarbative'?", which by the way, means repulsive. But if he used that people would say "That's a bit harsh, isn't it?" But he always uses it about anything involving improvisation. He loathes it with a passion."<sup>163</sup>

"Because there is this fear factor that people will turn off, and there is an immediacy in music. So they will do something on punk because they think that is cool and acceptable, but they will never talk about contemporary music. So I think it does either get not talked about, or it is always about the past and this whole idea of recreating the past – and that is either the amplifier or these digital models of amplifiers that allow you to dial up the particular sound of an amplifier. And I do think it is that idea of not really wanting ... maybe it is at the level of funders or policy or whatever – although we say we want contemporary arts, we actually don't like the sound of contemporary music."<sup>164</sup>

Allied to the perceived inadequacies of public discussion through mainstream media, was an aspiration for opportunities for wider exposure to art forms treated as marginal:

"Because it is hidden away and not talked about, like that relative in the attic who we don't really want to meet them or find anything out about them. I think, you know, contemporary music doesn't get played as much in concerts... . So I think we are in a probably finding it harder and harder and harder to get this stuff played and recognised and understood."<sup>165</sup>

The only answer in the face of such odds, is to create enclaves of enjoyment and appreciation: "...come to Cafe Oto, – you will find Lucy Railten playing Helmut

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<sup>162</sup> Dancers' Focus Group. Mary Kate Connolly.

<sup>163</sup> Alcorn/Beresford. Steve Beresford.

<sup>164</sup> Alcorn/Beresford. Michael Alcorn.

<sup>165</sup> *Ibid.*

Lachenmann's solo cello pieces in front of 100 people who sit there with a glass of wine, loving it."<sup>166</sup>

If achieving media coverage and audiences of sufficient scale are one challenge, another is articulating a voice. For dancers, it was suggested that a strong representative organisation would help to develop lobbying capacity and at least some economic clout. Asked if there was an umbrella organisation, one telling response was:

"There are many organisations that try to become that, but none is that comprehensive. And in terms of efficiency, in terms of measures, taking the step from the independent sector to success – if that can be measured by taglines, as they say the difference between the in-depth report and a tagline on an actual site. How much do these umbrella organisations reach outside the internal dance community towards a wider audience, I think is your question here, I don't think it is very much actually."<sup>167</sup>

Returning to more conventional ground, and in line with the dominant policy discourse which is so focused on 'skilling up',<sup>168</sup> more and better business abilities were also identified as important in order to sustain a creative business, even if the aim was to 'stay small' rather than to grow beyond a particular size:

"We have legal contracts that state that the work is split evenly this way... It is not something fun and creative that you just happily enter into and see what comes out of it – we have a business bank account together, so that is very serious stuff. And if you are prepared to do that, to take money and to pay people and pay yourself, then you have to be prepared to look at all the different implications of where your work goes, who says who is in charge of it, who paid for it, who does it go to ... and all those things need to be outlined because they will come into an argument."<sup>169</sup>

In one way or another, all our interviewees (who were at different stages of their careers) have had to make trade-offs between their creative aspirations and the

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<sup>166</sup> *Ibid.* Steve Beresford.

<sup>167</sup> Dancers' Focus Group. Johan Stjernholm.

<sup>168</sup> P Schlesinger, "Creativity: from discourse to doctrine?" (2007) *Screen* 48(3). Practical interventions that our interviewees thought might help them advance in their creative endeavours are in line with numerous official studies. See, e.g., *Creative Industries, Creative Workers and the Creative Economy*, prepared for the Scottish Government in December 2009 by Julie Carr, where strong support emerged for skills and infrastructure development. [www.scotland.gov.uk/Resource/Doc/289922/0088836.pdf](http://www.scotland.gov.uk/Resource/Doc/289922/0088836.pdf) (accessed 13 Dec 2011).

<sup>169</sup> Dancers' Focus Group. Aurora Fearnley. For a fascinating insight into the policy process that underpinned the development of the focus on greater skills training in the creative sector see N Garnham, "From Cultural to Creative Industries: An Analysis of the Implications of the 'Creative Industries' Approach to Arts and Media Policy Making in the United Kingdom" (2005) 11(1) *International Journal of Cultural Policy* 15-29, at 26.

imperative of making a living. Our research confirms that of others, which stresses the inherent fragility of creative work.<sup>170</sup>

## 6. Conclusion

While the leitmotiv of economics can hardly be ignored, we have deliberately chosen a different focus for this analysis, underlining the importance of understanding the anterior conditions of creative work that are not the usual purview of policy analysis or legal judgement. We have also gone further than is common in questioning of the relevance of rights to creative cultures in general and highlighted the policy mismatch between the current focus on increasing intellectual property rights and the mostly irrelevant nature of this strategy to the areas of creativity under investigation in this study.<sup>171</sup> An unresolved question is whether increases in rights (such as the extension of protection for sound recordings) would actively be *detrimental* to the interests of experiential, experimental musicians and dancers<sup>172</sup> or indeed, whether the intellectual property framework, as currently conceived, is itself damaging.

If we return to our research question – are experiential, experimental forms of music and dance beyond copyright text? – formulaically, this has been answered in the negative. But what we have uncovered is more nuanced. We need to develop an understanding of creative processes and outputs that is both *before* and *beyond* copyright. The creative process prior to fixation is of prime importance and is thus *before* copyright; and there is much about a performance that defies fixation or is of the kind not recognised by the criteria required for copyright protection, and is thus *beyond* copyright. Going forwards, and in a time of stretched public funding, knowing where to target limited resources for maximum return is going to be of vital importance. Appreciating that increased or even existing protection by copyright is of only marginal importance to experiential, experimental forms of music and dance, and that other initiatives might have a greater impact in supporting the art forms, opens the terms of debate as to what new strategies of targeted support might be developed.

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<sup>170</sup> For a thorough analysis, see D Hesmondhalgh and S Baker, *Creative Labour: Media work in Three Cultural Industries* (London and New York: Routledge, 2011).

<sup>171</sup> In “From Cultural to Creative Industries: An analysis of the implications of the ‘creative industries’ approach to arts and media policy making in the United Kingdom”, note 170 above, Nicholas Garnham notes the development of the policy focus on increasing IP rights for the creative industries with a particular emphasis on the term ‘creative’: *The software industry was pushing for the contentious widening of intellectual property protection of software. The major media conglomerates wanted an extension of copyright protection and its reinforced policing. In all cases, this involved the undermining of existing public use provisions and also, according to some analysts, a break on innovation rather than its encouragement. It suited these interests to sell the extension of copyright as a defence of the interest of “creators” with all the moral prestige associated with the “creative artist”.*

<sup>172</sup> And we have also gone further than is common with the interdisciplinary nature of this project. Initially conceived of in 2007 on a trip to São Paulo where the network team members met when promoting collaborations in the field of creative industries for the AHRC and their Brazilian counterpart, ideas really started to ferment on a visit to the Santa Maria samba club. The final interdisciplinary line-up of network members has tested disciplinary boundaries and challenged contributors to think about the subject area from a number of different perspectives. The success of the project with its range of insights and outcomes reflects this interdisciplinarity.