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In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community

BARBARA A. SINGER*

One of the improvements in the 1976 Copyright Act was the specific recognition of choreographic works as copyrightable material. The Act's focus on the protection of economic rights, however, fails to address the primary interest of the dance community in the preservation of "moral rights" in a work. The author examines the unique concerns of choreographers, and concludes that it is customary, and not legislative or judicial, law that continues to provide the best protection of choreographers' artistic interests.

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I. INTRODUCTION

Until recently, American law had always been content to treat dance as the black sheep of the arts. Although both Congress and the courts long ago recognized the cultural and historical importance of performing arts such as drama and music,¹ neither Congress nor the courts were willing to grant dance its due. Congress effectively denied statutory copyright protection to choreographic works by repeatedly refusing to include choreography in the list of copyrightable works.² The courts likewise had a long history of denying protection to choreographic works.³

The enactment of the Copyright Revision Act of 1976⁴ forced lawmakers and lawyers to rethink their position on the legal status of choreography.⁵ With the express extension of statutory copyright privileges to "choreographic works and pantomimes,"⁶ dance was no longer a mere stepchild of drama.⁷ Dance had achieved le-

1. Musical compositions were first recognized under the Copyright Revision Act of 1831. Act of 1831, Feb. 3, c. 16, 4 Stat. 436. Dramatic works were first recognized under the Copyright Revision Act of 1856. Act of 1856, Aug. 18, c. 169, 11 Stat. 138.

2. A number of copyright revision bills were introduced but rejected from 1924 to 1940. These included the Dallinger Bill of 1924, the Perkins Bill of 1925, the Vestal Bill of 1931, the Duffy Bill of 1935, and the Sirovich Bill of 1936. STAFF OF SENATE COMM. ON THE JUDICIARY, 86th CONG. 2d SESS., STUDIES PREPARED FOR THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS 99 (Comm. Print 1961) (B. VARMER, STUDY NO. 28, COPYRIGHT IN CHOREOGRAPHIC WORKS (1959)) [hereinafter cited as VARMER].

3. Courts have often demonstrated suspicion of the moral worth of dance. In *Martinetti v. Maguire*, 16 F. Cas. 920 (C.C. Cal. 1867) (No. 9, 173), the court refused to protect a series of ballet tableaux because the court thought the production was "indecent" and "corrupt." In *Dane v. M & H Co.*, 1316 U.S.P.Q. (BNA) 426 (N.Y. Sup. Ct. 1963), the court denied protection of the plaintiff's military striptease dance because, in the court's opinion, the dance contained nothing calculated to improve the moral or intellectual natures of the audience.

4. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (Supp. V 1981 & West Supp. 1983)) [hereinafter cited as Copyright Act]. Title 17 was enacted by the Act of July 30, 1947, ch. 391, 61 Stat. 652, which repealed, revised, and incorporated sections of the 1909 copyright act as amended, Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075. Most of the provisions of the 1976 revision became effective, supplanting the 1947 act, on January 1, 1978. Sections 118, 304(b) and chapter 8 of the revised act became effective October 19, 1976.

5. The word "choreography" has several meanings. WEBSTER'S NEW WORLD DICTIONARY (College Ed. 1966) defines it as (1) dancing, especially ballet dancing; (2) the arrangement or the written notation of the movements of a dance, especially ballet; (3) the art of devising dances, especially a ballet. This article uses the word "choreography" primarily to signify the art of devising dances.

6. 17 U.S.C. § 102(a)(4) (Supp. V 1981).

7. The 1947 copyright act, as its 1909 predecessor, made no provision for the separate registration of choreographic works. Those few dances actually registered under that act were relegated to the category of "dramatic or dramatico musical composition." Act of July 30, 1947, ch. 391 § 5(d), 61 Stat. 652, 654 (revised 1976).

gal recognition as a separate, viable form of art.

The unquestioned assumption of the legal profession has been that statutory recognition is essential to the preservation of choreographic rights.⁸ The profession has therefore believed that once choreographers became aware of the protection extended to their works under the 1976 Act, they would secure registered proof of that protection. Led by dancer and choreographer Agnes de Mille,⁹ some choreographers have demonstrated their belief in the value of statutory protection by registering their works under the Copyright Act.¹⁰

Nevertheless, the vast majority of choreographers, particularly those less successful financially or those working primarily within the confines of their own dance community, have not pursued the

8. See, e.g., Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 NEW ENG. L. REV. 227 (1981); Comment, *Unraveling the Choreographer's Copyright Dilemma*, 49 TENN. L. REV. 594 (1982); Comment, *Moving to a New Beat: Copyright Protection for Choreographic Works*, 24 U.C.L.A. L. REV. 1287 (1977).

9. As early as 1959, de Mille pleaded for "some chance to protect our basic rights." Letter from Agnes de Mille to United States copyright office (Nov. 10, 1959), reprinted in VARMER, *supra* note 2, at 110.

One basic right that de Mille believes has been violated in the past is the choreographer's right to receive appropriate remuneration for choreographic work. As she explains it, "Rodgers and Hammerstein got me \$50 a week for the twenty-seven-and-a-half minutes of dance I composed for *Oklahoma!*, but no royalties. After five years, it was raised to \$75 a week and some more money from the touring company." Osterle, *Indomitable Spirit*, BALLET NEWS, Sept. 1983, at 11, 16. De Mille has been unable to share in the enormous profits (estimated to be over \$60 million for just the first fifteen years of the musical's existence) that *Oklahoma!* has earned. Comment, *Moving to a New Beat*, *supra* note 8, at 1287. Laments de Mille, "There are fifty shows around the world of *Oklahoma!* every week, and I could have been a millionaire." Osterle, *supra*, at 16.

This problem, however, is not unique to choreographers. The case of Richard Peaslee's *Marat/Sade* score illustrates how vulnerable even recognized music composers can be. The Royal Shakespeare Company commissioned Peaslee to compose the score for its Aldwych production of *Marat/Sade*. Peaslee signed the contract "without lengthy study or any expert counseling." Peaslee later rued his haste. Because the contract contained no billing clause, Peaslee's name was listed at the bottom of the credits and was even misspelled. Later, Peaslee found himself unable to negotiate for royalties from the successful Broadway production of *Marat/Sade* because his original contract gave him a flat \$500 for all "tours." Peaslee, *A Creator's Point of View*, 6 PERF. ARTS REV. 448, 449-50 (1975-76). The moral seems to be that not even a statutory copyright can protect the careless or unwary from unprofitable deals.

10. De Mille has registered some 18 choreographic works. Letter from Agnes de Mille to Barbara Singer (Feb. 28, 1983). Antony Tudor and the late George Balanchine have also registered a substantial number of their works. In addition, the Dance Notation Bureau is actively working toward the registration of choreographic works.

The Dance Notation Bureau was founded in 1940. It is a not-for-profit corporation "dedicated to the understanding, documentation and preservation of human movement through analysis and notation." The Dance Notation Bureau assists choreographers, dance companies, and dancers in the notation and reconstruction of dances.

opportunity to register their works under the new Act.¹¹ And even those choreographers who have registered their works have been reluctant to enforce their statutory rights in a court of law.¹² Choreographers have not eschewed the statutory mechanism for enforcing their rights because they are unaware that an enforcement mechanism exists. Instead, they have rejected this form of protection from a belief that the customs of their own community offer equal, if not superior, protection for choreographic works.

This article will consider whether, for those choreographers who work primarily within the dance community, the custom of that community provides a better method for protecting the choreographer's artistic rights than do existing statutory or judicial schemes. The article will examine the customary protection of choreographic rights and analyze the current Copyright Act. Finally, this article will look beyond the present interpretation of the statute to consider the feasibility and effectiveness of legislative or judicial reform as an alternative to the existing statutory scheme. The conclusion will be that, at least for the foreseeable future, the custom of the dance community offers the best form of protection for the majority of choreographers.¹³

11. In fiscal year 1980, only 63 of 464,743 total works registered were choreographic pieces or pantomimes. U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS, 1980, at 27 (1981), cited in Comment, *Unraveling the Choreographer's Dilemma*, *supra* note 8, at 595. The majority of the choreographers interviewed for this article had neither registered nor planned to register their works. The following choreographers were interviewed for this article, either in person, by mail, or by telephone: Thomas Armour—Founder, Miami Ballet; Gigi Buffington, Manager—Gus Giordano Dance Center; Merce Cunningham, Artistic Director, and Michael Bloom, Administrator, Cunningham Dance Foundation; Agnes de Mille, noted Broadway choreographer; Eliot Feld, Artistic Director, and Cora Cahan, Executive Director, Feld Ballet; Barbara Horgan, Personal Assistant to the late George Balanchine; Paul Mejia, Assistant Artistic Director, Chicago City Ballet; Ruth Page, Artistic Director, Ruth Page Foundation; Patricia Strauss, Artistic Director, L'Image; Muriel Topaz, Executive Director, and Pat Rader, Librarian, Dance Notation Bureau; Antony Tudor, Choreographer Emeritus, American Ballet Theatre; Kyle Williams, Staff, The American Dance Machine; Robert Yesselman, General Manager, Paul Taylor Dance Company.

12. Indeed, not one case involving a statutory copyright of choreography has yet reached an American court of law.

13. This article will focus primarily on the dance community itself, where the scope of choreographic rights is fairly well determined. It must be noted that the question of choreographic credits becomes much less settled when a choreographer chooses to work outside the dance community, as, in musical comedy or films. Indeed, experts in the area consider this question to be so unsettled that the prominent New York copyright law firm of Cowan, Liebowitz & Latman has, at the request of the Society of Stage Directors and Choreographers, undertaken a lengthy study of the ownership and use of stage direction and choreography. Hummler, *Who "Owns" Direction, Choreography*, *VARIETY*, Aug. 3, 1983, at 69, col. 3.

II. CUSTOMARY PROTECTION OF CHOREOGRAPHIC RIGHTS

Although the popularity of dance is growing in America,¹⁴ dance has yet to achieve the prominent position that other performing art forms, such as music and drama, have traditionally enjoyed with American audiences. The second-class status of dance has had a detrimental effect on the development of the art of choreography. First, audiences tend to be scarce for most choreographers and dance companies who work and perform outside of New York City.¹⁵ Second, even choreographers and dance companies who do manage to find an audience usually see their potential profits eaten up by the growing costs of mounting a production.¹⁶ Third, because paying audiences are small, while production costs are high, most choreographers and dancers are seriously underpaid.¹⁷ As a consequence of these factors, fewer artists are drawn to dance than to the other arts.

These same factors, however, have also combined to bestow a benefit on the art of choreography. The relatively few artists willing to commit themselves to the dance and their New York focus¹⁸ have promoted the creation of a close-knit, protective community. The stability of this community has provided dancers and choreographers with an environment fostering the creation and enforce-

14. Note the recent success of popular dance movies, such as *Flashdance* and *Stayin' Alive*.

15. Although some regional dance companies such as the San Francisco Ballet and Utah's Ballet West have managed to cultivate a loyal home following, most regional companies are struggling to attract the local audiences that often mean the difference between financial failure and success. The San Diego Ballet, for example, was forced to cease operations some three years ago after amassing some \$200,000 worth of debts. *BALLET NEWS*, Jan. 1984, at 9.

Even major companies however, are not immune from money problems. The American Ballet Theatre has recently suffered a serious financial setback, due to the nine-week dancer lockout and the \$1.8 million loss that it suffered during the 1982-83 season. *BALLET NEWS*, Dec. 1983, at 6.

16. The costs of major productions are phenomenal. The American Ballet Theatre's new production of "Cinderella" carries a price tag of \$800,000. *BALLET NEWS*, Dec. 1983, at 6. Even a "small production, such as ABT principal dancer Martine Van Hamel's 'Amnon V'Tamar' can cost as much as \$75,000." *The Miami Herald*, Jan. 7, 1984, at D 1-2.

17. See, e.g., T. BENTLEY, *WINTER SEASON* 33 (1982) where New York City Ballet dancer Toni Bentley laments the dancer's plight: "We only want enough to pay the rent. Many of the younger kids simply cannot afford it." *Id.*

18. Some dance artists, such as choreographer Michael Smuin and dancer Evelyn Cisneros of the San Francisco Ballet and choreographer Ben Stevenson and dancer Janie Parker of the Houston Ballet, have managed to achieve major success and fame on the regional level. But most regional dancers and choreographers are either preparing themselves for an eventual move up to the "big leagues" in New York or are winding down careers after having made a stab at New York success.

ment of customs both practical and sensitive to the unique needs of choreographers.

A. *Scope of Choreographic Customs*

Choreographers are respected members of the dance community. In recognition of their value, community custom provides rules that credit and protect a choreographer through each stage of the creation and presentation of his works.

1. CHOREOGRAPHIC CREDIT

For most choreographers, the creative process is a long,¹⁹ arduous task.²⁰ The choreographer usually begins with an inspiration derived from an intriguing story, musical composition, or vague mental image of movement. In the studio, the choreographer uses his body or the body of selected dancers to translate his inspiration into movement. For weeks and hours, the choreographer carefully develops and refines his dance. Eventually, the dance is "set"²¹ and ready for performance.

Enduring choreographic credit is the reward that the dance community awards to the artist who pursues the difficult choreographic process from inspiration to performance. The choreographer's name attaches to his work at the first and all subsequent

19. The late George Balanchine has estimated that a "fast choreographer can produce one minute of stage dance in one hour of rehearsal time." Steinbrink, *Footnotes*, *BALLET NEWS*, Nov. 1981, at 6. Many choreographers, however, cannot keep pace with Balanchine's estimate.

20. *Creation of a Ballet—"The Overgrown Path"* is a 1981 ABC Video Enterprises, Inc. documentary that illustrates this process. The documentary follows Jiri Kylian, artistic director and choreographer of the Nederlands Dans Theater, as he creates and eventually presents a new ballet. Kylian first identifies a Leos Janacek composition entitled "On the Overgrown Path" and a book of photography taken in Janacek's homeland as the sources of inspiration for the new ballet. Kylian next describes the visual patterns he hopes to achieve in the ballet. The camera then follows him into what he describes as the most difficult stage of creating: making his original dreams and thoughts real and visible. As Kylian works in his studio alone and with his company dancers he explains how he transfers his thoughts to the bodies of the dancers. Sometimes he has a vision but is forced to alter it because the dancer cannot perform it exactly as he originally imagined it. Other times the inspiration comes from the dancer rather than from Kylian himself. Eventually, however, the give and take between dancer and choreographer forms a dance.

The camera continues to follow Kylian as he rehearses the dance, meets with set and costume designers, and coordinates the activities that must combine to make a successful production. The documentary closes with shots of Kylian taking bows at the successful premiere of "The Overgrown Path."

21. A dance is "set" when it is fixed in a recognizable and final form in the minds and muscles of the dancers with whom it was created. See Traylor, *supra* note 8, at 234-35.

performances of the work,²² whether or not the choreographer, his company, or another company has legal ownership of the piece.²³

2. CHOREOGRAPHIC CONTROL

The dance community also recognizes a choreographer's right to control his works, even after he has "released" them to the public.

Dance companies customarily consult with a choreographer or his representative²⁴ before requesting permission to perform the

22. For example, Marius Petipa's name is still linked to the classic ballet, "Sleeping Beauty" (first performed in 1890), even though the ballet's choreography has undergone many changes and revisions through the decades since its first performance.

Enduring choreographic credit may also be offered outside the dance community. The Playbill for the current revival of *On Your Toes*, for example, gives credit for "Original Choreography" to the late George Balanchine. 83 PLAYBILL, May 1983, at 40 (credits). Balanchine, who created the dances for the original 1936 production of the musical, was afforded credit for the 1983 production even though illness prevented him from participating in the revival and even though significant choreographic changes were made by Peter Martins (who received credit in the Playbill for "Additional Ballet Choreography") as he restaged the dances. See Mitchell, *Reviving On Your Toes*, DANCEMAGAZINE, Mar. 1983, at 60, 61.

Note, however, that some complaints have been made about the failure to give original musical-comedy choreographers credit in later revivals of the shows. Agnes de Mille, Gwen Verdon, and others maintain that the late Jack Cole should have received choreographic credit for the 1977 Broadway revival of *Man of La Mancha*. Cole did work on two dances for the 1965 Broadway production (for which he received choreographic credit), but Albert Marre, who directed both the 1965 and 1977 versions, claims that Cole "did not choreograph or stage dance sequences" for either version. (Marre maintains that the authors, the producer, and the director rejected the material that Cole had arranged). De Mille, Verdon, and others, however, claim that the *Man of La Mancha* dances bear the unmistakable "Jack Cole look." The issue has yet to be resolved. Loney, *The Legacy of Jack Cole, Part Six*, DANCEMAGAZINE, June 1983, at 62. Perhaps the Cowan, Liebowitz & Latman study, *supra* note 13, will help resolve questions such as this one.

23. Some choreographers, such as resident company choreographers, create dances within the scope of their employment or by special order or commission. In these cases the works created become "works for hire" and belong to the employer rather than to the choreographers who made them. 17 U.S.C. § 101 (Supp V 1981).

24. The Dance Notation Bureau, for example, acts as a licensing agent between choreographers and companies that wish to have a choreographer's work reconstructed from a notated score. See Anderson, *Preserving Dances in Print*, N.Y. Times, May 6, 1979 § 2, at 20, col. 2.

Similarly, those companies who wish to perform works of the late George Balanchine must now contact certain named beneficiaries under his will. Barbara Horgan, Balanchine's long-time personal assistant, and Karin Von Aroldingen, a New York City Ballet (NYCB) principal dancer, share media and foreign rights to most of Balanchine's ballets. Tanaquil LeClerq, Balanchine's fourth wife and former NYCB principal dancer, has been given the U.S. rights to most of the ballets. In addition, full rights to certain named ballets have been given to the dancers who created the lead roles in those ballets. Although NYCB created no rights, the company is apparently seeking permission from the beneficiaries to retain artistic control over its own performances of Balanchine ballets. Taub, *Footnotes*, BALLET NEWS,

work.²⁵ Generally, the choreographer or his representative visits the company to determine the company's capability of performing the dance. The choreographer evaluates both the technical abilities and the personalities of the company dancers. A choreographer will permit the performance of his work only after being convinced that the skills of the company reflect the artistic worth of the composition.²⁶

If the choreographer assents to performance of his work, the parties enter into a formal licensing agreement.²⁷ Central to most licensing contracts is the right of performance. The licensee has the right to perform a specified work for a certain period of time or number of performances. The licensee agrees to pay a license fee for the performance rights and a royalty for each performance given.²⁸

The licensing agreement also insures the integrity of the licensed work in its performance. In most cases, the choreographer retains artistic control. The contract will provide that the choreographer or his agent²⁹ teach the dance and supervise a specified

Aug. 1983, at 8. It must be noted that, although many of Balanchine's ballets have been registered with the Copyright Office, it is not clear that all of the bequeathed ballets are registered. The courts have yet to hear a case concerning a bequest of either a registered or a non-registered ballet.

25. Ronn Guidi recently described this process in *Loring Remembered*, *BALLET NEWS*, Dec. 1982, at 36. The author related how he, as founder of the Oakland Ballet, approached the late Eugene Loring for permission to perform two of his ballets, "Billy the Kid" and "Sisters." In response to Guidi's invitation, Loring first visited the Oakland Ballet in 1976 to assess its ability to perform "Billy the Kid." Loring granted permission after watching the company take class. He then taught the ballet to the company and guided them through first rehearsal and then performance. After the successful performance of "Billy the Kid," Guidi approached Loring for permission to perform "Sisters." "Finally," Guidi recalls, "I asked him if we had the people to do it. One could see his mind reviewing the personalities of the dancers in the company. Finally, a 'Yes' came. . . ." *Id.*

26. If a choreographer denies permission he may suggest an alternate work that he believes the company is better able to perform.

27. These contracts are generally of short duration. Dance Notation Bureau licensing agreements normally last for one to two years. The Bureau has granted, however, licenses for up to five years when the licensee company has incurred exceptional expenses because a full score did not exist. Letter from Muriel Topaz, Executive Director, Dance Notation Bureau, to Barbara Singer (Nov. 1, 1982).

The choreographers interviewed for this article, see *supra* note 11, indicated that their licensing customs make no distinction between dances that are protected by statutory copyright registration and those that are not.

28. The right of performance is normally the only economic right included in these contracts. The licensee may receive a limited right to make copies, but this is usually restricted to rehearsal and reconstruction purposes only. Derivative rights are generally not included, nor does the contract cover the licensing of musical scores.

29. Often the choreographer, sends a member of his own company who is familiar with the dance in question.

number of rehearsals,³⁰ including final stylistic rehearsals.³¹ The contract may also provide for the choreographer's participation in the staging of the dance.

In many licenses the choreographer's artistic control does not end with the first performance of his dance.³² Stipulations may permit periodic review by the choreographer. The contract may also prohibit any choreographic or staging alterations in the work absent consultation with the choreographer. The choreographer may also reserve the right to withdraw the work if he believes that the company is no longer capable of performing his dance.³³ Thus, the licensing customs of the dance community accommodate both the licensee company and the licensor choreographer. The company receives the right to perform a desired work; the choreographer receives the assurance of monetary remuneration and the retention of two cherished rights: the credit for his choreographic work and maintenance of continued artistic control.

B. *Enforcement of Choreographic Customs*

Both choreographers and potential licensees view choreographic licensing agreements as a fair and efficient method of determining their rights and responsibilities. Breaches of these contracts are therefore rare.³⁴

Occasional breaches are nevertheless inevitable. Potential licensees, particularly those outside the dance world, may not feel constrained to honor the dance customs of affording creative credit

30. The choreographer usually receives a designated fee for all such services rendered. The choreographer's transportation and a per diem for time spent on location are also covered by the licensee.

31. The choreographer may be assisted by the licensee company's *Regisseur*, who, among other things arranges, coordinates, and supervises rehearsals.

32. The crucial role continued creative control plays in the choreographic process is demonstrated by the negotiations that surrounded the birth of the Public Broadcasting System (PBS) "Dance in America" series. Dance experts, including Robert Joffrey, and Edward Villella, were called to the first meeting. These experts were unanimous in their belief that the series should not get off the ground "unless the choreographer [could] be part of the entire process right through the editing." The PBS representative opposed the giving of creative control to the choreographers, but the major funders involved in the program threatened to withdraw unless the choreographers were in control. PBS eventually bowed to the financial pressure and recognized the choreographer's right to artistic control in all "Dance in America" programs. *Cable Production: What Every Arts Organization Needs to Know* (R.K. Manoff ed. 1982) (quoting C. Aaron, Senior Vice President for programming at PBS, 1976-1981).

33. See *infra* note 107, for examples of withdrawals that have actually occurred.

34. There are apparently no recorded cases of actions for breach of a choreographic licensing agreement.

to the choreographer³⁵ and seeking permission to perform works already presented to the public. Furthermore, the choreographer may not always occupy an equal bargaining position with the potential licensee. Contracts resulting from negotiations conducted under these conditions may deprive the choreographer of adequate protection. And even those contracts granting the choreographer his royalty and artistic control rights may still be violated by an uncooperative licensee.

Few choreographers consider seeking a legal remedy for breach of a licensing contract. There are several reasons for their rejection of legal sanctions. First, some choreographers view unlicensed performances as a risk of the trade of choreography or free publicity. Second, most choreographers prefer to rely on negotiation or peer pressure in settling their differences with breaching licensees.³⁶ Third, even choreographers who initially consider the pursuance of legal action are discouraged by the costs involved in bringing suit: litigation is an expensive, lengthy process that may strain the budget and patience of struggling choreographers.³⁷ Furthermore, the small amounts of lost profit resulting from the breach of most choreographic licenses fail to justify legal effort.³⁸ Finally, unless the choreographer initially possessed sufficient bargaining power to insure contract provisions that favored him, legal enforcement of the contract may not offer him much relief.

Choreographers thus have a licensing custom strong enough to protect them from most unauthorized use of their choreographic works. Community sanction or the philosophy of the risk of the trade resolves most of those violations that do occur. For the majority of choreographers, then, there is no need for resort outside the dance community for protection of choreographic works.

35. See *supra* note 22, the discussion of Jack Cole and the *Man of La Mancha* choreography.

36. Many choreographers maintain that the threat of ostracism from the dance community is sufficient to deter most potential breaches. See *supra* note 8.

37. Choreographers and dancers have a reputation for being uncomfortable with business and financial transactions. In her journal, *Winter Season*, New York Ballet dancer Toni Bentley remarks, "[W]e are all grossly ignorant of money matters, our rights, and even what we can and should demand. . . ." T. BENTLEY, *WINTER SEASON* 33 (1982). This attitude is clearly changing: witness the recent successful nine-week strike by the dancers of the American Ballet Theatre.

38. See Bennetts, *Pirating of the "The Pirates of Penzance"*, N.Y. Times, Aug. 25, 1982; Wilford Leach, director of the New York Shakespeare Festival production of "Pirates," commenting on the high cost of copyright litigation, noted that "[t]he copyright law merely gives you the right to sue. But lawsuits are enormously expensive. You can't necessarily afford to recover the money; it would cost more to get it than you would get."

III. RECOGNITION OF CHOREOGRAPHIC RIGHTS UNDER THE 1976 COPYRIGHT ACT

Although most of the choreographic community has been satisfied with relying on licensing customs, the legal community believes that choreographers can gain full protection of their works only by registering them under the provisions of the Copyright Act. Although the Act does provide some benefits to choreographers,³⁹ certain aspects of the Act may discourage even successful choreographers from profiting from the Act's protection. And even choreographers deciding to register their works may discover that the rights enforceable as a result of registration⁴⁰ exclude those rights most valuable to the choreographer.

A. *Qualifying Choreographic Works for Statutory Registration*

The Copyright Act establishes prerequisites for registration of a choreographic work with the Copyright Office. The nature of the Act's requirements and the effort necessary for their fulfillment tend, however, to discourage many choreographers from registering their works.

1. STATUS AS A "CHOREOGRAPHIC" WORK

The 1976 Act provides for registration of a creative endeavor if it qualifies as a "choreographic work."⁴¹ Although the Act does not define the phrase "choreographic work,"⁴² the legislative history and case law underlying the Act suggest a definition far narrower than that customarily followed by the choreographic community. Among members of that community, choreography is loosely defined as anything a choreographer presents to the public.⁴³ Legislative history indicates that the drafters of the new Act ascribed a stricter definition to the word. The drafters meant to exclude "so-

39. See *infra* notes 80-93 and accompanying text.

40. Copyright registration is permissive under the new Act. 17 U.S.C. § 408(a). Although copyrights automatically subsist in all works of authorship fixed in any tangible medium of expression, 17 U.S.C. § 102(a), no action for infringement of such rights may be maintained unless the work is registered with the Copyright Office. 17 U.S.C. § 411(a).

41. 17 U.S.C. § 102(a)(4).

42. The drafters thought it unnecessary to define "choreographic works" because they believed the phrase had "a fairly settled meaning." H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976), reprinted in 1976 U.S. CONG. CODE & AD. NEWS 5659, 5666-67.

43. The choreographers interviewed for this article initially offered a variety of definitions, from "movement" to "making dances." When pressed, however, none was willing to settle for a definition that would in any way restrict a choreographer's prerogative to create however and whatever he chooses.

cial dance steps" and "simple routines" as too common or basic to merit copyright protection.⁴⁴ The Act thus attempts to set an arbitrary minimum level of difficulty, which can act to deny registration to very simple or highly innovative dances.⁴⁵

Under the old Act, choreographers had to register their works under the rubric of "dramatic composition."⁴⁶ To qualify for registration a dance had to depict some story or emotion.⁴⁷ The dance community, however, has always refused to classify choreography as a mere species of drama. Instead, choreographers view their work as a separate and distinct art form, which embodies "an arrangement in time-space, using human bodies as its units of design."⁴⁸ Thus, although a choreographer has the freedom of portraying a story through the movements he creates,⁴⁹ he may

44. H.R. REP. NO. 1476, *supra* note 42, at 54, reprinted in U.S. CODE CONG. & AD. NEWS at 5567; see also VARMER, *supra* note 2, at 100 (copyright presupposes an original intellectual creation of authorship).

45. Agnes de Mille, warned against setting such a minimum standard, claiming that "[i]t is not the province of the law to judge whether a dance, even the most trite and commercial, has creative original value." VARMER, *supra* note 2, at 110 (letter from Agnes George de Mille).

46. Act of Mar. 4, 1909, ch. 320, § 5(d), 35 Stat. 1075, 1076; Act of July 30, 1947, ch. 391, § 5(d), 61 Stat. 652, 654. Section 5(d) provided for the registration of "dramatic or dramatico-musical compositions." Section 202.7 of the Regulations enacted under the old Act allowed "choreographic works of a dramatic character" to be registered under § 5(d). Taubman, *Choreography Under Copyright Revision: The Square Peg in the Round Hole Unpegged*, 10 PERFORM. ARTS REV. 219, 220 (1980).

47. Courts recognized as early as 1868 that a story could be portrayed by movement as well as by words. *Daly v. Palmer*, 6 F. Cas. 1132, 1135-36 (C.C.S.D.N.Y. 1868) (No. 3,552). But movement that did not tell a story or depict emotions could not qualify as a dramatic composition. *Fuller v. Bemis*, 50 F. 926, 929 (C.C.S.D.N.Y. 1892). Early regulations issued by the Register of Copyrights echoed the law's hesitant approach to choreography. Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 803 (1952). In 1948, however, the Register officially sanctioned the registration of choreographic works that fit the definition of "dramatic composition." As a result of this action, Hanya Holm was able to register her *Kiss Me, Kate* choreography in 1952. Martin, *The Dance: Copyright*, N.Y. TIMES, Mar. 30, 1952, § 2 Pt. I, at 10x, col. 6; Beckley, *Choreography Is Copyrighted For First Time*, N.Y. HERALD TRIBUNE, Mar. 14, 1952; Mirell, *supra*, at 810. Other choreographers began to follow suit. In 1953 Ruth Page successfully registered the text of her "Beethoven Sonata" as a "published book." *Choreographer Gets Copyright Under New Act*, N.Y. HERALD TRIBUNE, Jan. 7, 1953. And George Balanchine resubmitted and successfully registered his "Symphony in C," which had been submitted and rejected prior to the registration of Holm's dances. See Arcomano, *A Dancer's Business: Choreography and Copyright* (pt. 1), DANCEMAGAZINE, Apr. 1980, at 58-59. The success of these registrations ultimately paved the way for the statutory reform of 1976.

48. VARMER, *supra* note 2, at 110 (letter from Agnes de Mille).

49. A recent example of a "story" ballet is Peter Martins' "Magic Flute." Martins began with a basic story and scenario instructions (e.g., "Luke plays the flute"), which had been written on the piano score used in the original Ivanov version of "The Magic Flute." Martins then filled in the details of the storyline and devised choreography to convey the

express his art through means other than movement.⁵⁰

The drafters of the 1976 Act included a separate category for choreographic works in order to eliminate the storytelling requirement. Case law treatment of choreographic works, however, exhibits a constitutionally based bias that is more difficult to dismiss. Article 1, section 8 of the Constitution restricts copyright protection to works of authorship that promote the "useful" arts.⁵¹ Courts have interpreted this restriction as an invitation to judge the moral worth of choreographic works.⁵² But just as choreographers shrink from the notion of any application of arbitrary standards of difficulty to their works, they also abhor any legal judgment of the morality of their works.

In light of the biases reflected in legislative history and case law, it is not difficult to see why choreographers, particularly those operating outside of the mainstream of traditional dance, are reluctant to register their works under the statutes: to do so would be to offer tacit approval to the statutory and case law definitions of choreography that they, as choreographers, find so offensive.

story and emotions of this fairy tale. Martins & Cornfeld, *Working Magic*, BALLETS NEWS, Jan. 1982, at 23.

50. Merce Cunningham, for example, maintains that his choreography does not begin "with an idea that concerns character or story, a *fait accompli* around which the actions are grouped for reference purposes." Instead, he starts "with the movement," which may even involve something rather than someone moving. Cunningham, *Two Questions and Five Dances*, in *DANCE AS A THEATRE ART* 198, 199 (S. Cohen ed. 1975). And modern choreographer Paul Taylor once went so far as to create a dance, "Epic," that did not involve any movement at all. (He simply stood motionless in a business suit on stage while the audience listened to a recording of telephone time signals).

51. "The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive Right to their respective writings. . . ." U.S. CONST., art. I, § 8.

52. In the 1867 case of *Martinetti v. Maguire*, 16 F. Cas. 920 (C.C. Cal. 1867) (No. 9,173), the court refused to recognize copyrights in a production that consisted of scant dialogue "tacked on to a succession of ballet and tableaux." *Id.* at 922. In the court's judgment this "exhibition of women 'lying about loose' or otherwise" was indecent, corrupt, and in no way promoted the useful arts. *Id.* The court in *Fuller v. Bemis*, 50 F. 926, 929 (C.C.S.D.N.Y. 1889) was likewise wary of the seductive effect created by modern dance pioneer Loie Fuller as she swirled her skirts in her "Serpentine Dance."

This early concern for the immoral nature of dance cannot be dismissed as mere Victorian prudery. As late as 1963 a court rejected protection of a choreographic work on these grounds. *Dane v. M & H Co.*, 136 U.S.P.Q. (BNA) 426 (N.Y. Sup. Ct. 1963). The plaintiff in this case had created a military/striptease dance number, which she had used to audition for a role in the stage version of "Gypsy." The court refused to recognize the plaintiff's common-law copyright claim on the grounds that where "a performance contains nothing of a literary, dramatic or musical character which is calculated to elevate, cultivate, inform, or improve the moral or intellectual natures of the audience, it does not tend to promote the progress of science of the useful arts." *Id.* at 429.

2. STATUS AS AN "ORIGINAL" WORK

Those dances that come within the statutory definition of "choreographic work" must also be "original" in order to qualify for statutory copyright protection. Although "original" can mean "novel" or "unusual,"⁵³ in the context of copyright law the term signifies that a work has had its origin in the skill, labor, or judgment of its creator.⁵⁴ The courts have not yet considered the level of originality required for choreographic works. Nevertheless, cases involving musical compositions provide some guidance. In analyzing the originality of music, courts look to the manner in which rhythm, harmony, and melody are combined.⁵⁵ These are the "fingerprints" of the composition; they establish its identity.⁵⁶ If the composer injects something new and recognizably his own into the combination of notes that he presents to the public, the resulting piece will be copyrightable,⁵⁷ even if the composition uses familiar rhythm or harmony patterns.⁵⁸

Similarly, in judging originality of a choreographic work, the court should consider the choreographer's treatment of rhythm, space, and movement in the work. As long as the dance bears the choreographer's individual stamp,⁵⁹ it is irrelevant that his dance

53. See *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951). The *Alfred* court upheld the validity of a copyright in certain mezzotints based on works in the public domain because the tints were "versions" that "'originated' with those who made them." *Id.* at 104.

54. *Id.* In *Puddo v. Buonamici Statuary, Inc.*, 450 F.2d 401, 402 (2d Cir. 1971), the court dismissed a claim of copyright infringement because the plaintiff's statuettes did not bear proper copyright notice. The court did, however, declare that the statuettes were copyrightable because they had been made "from scratch" and evidenced a "modicum of originality." *Id.* at 402, 403.

55. *Northern Music Corp. v. King Record Distrib. Co.*, 105 F. Supp. 393, 400 (S.D.N.Y. 1952). The plaintiff's song, "Tonight He Sailed Again" was found to be "similar" to the defendant's song, "I Love You, Yes I Do." The court nevertheless declared the plaintiff's song to be copyrightable because "when played [the plaintiff's song] leaves an impression of newness or novelty. . . ." *Id.* at 400.

56. *Id.*

57. *Id.*

58. See *Hein v. Harris*, 175 F. 875, 877 (C.C.S.D.N.Y. 1910). The plaintiff complained that the chorus of the defendant's song, "I Think I Hear a Woodpecker Knocking at My Family Tree," closely imitated the chorus of the plaintiff's song, "The Arab Love Song." Judge Learned Hand agreed that an infringement had occurred because, out of a total of 17 bars, the first 13 of each song were substantially the same. Judge Hand noted, however, that "the right of the author of a musical composition is not affected by the fact that he has borrowed in general from style of his predecessors." *Id.* at 877.

59. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Justice Oliver Wendell Holmes considered the copyrightability of certain chromolithographies that had been prepared for circus advertisements. Although the plaintiff's works were of "limited pretensions," Justice Holmes believed them to be copyrightable because they emanated

uses well-known or often-used steps. Choreographers are legitimately concerned, however, that the courts lack the expertise to make such artistic decisions. By declining to pursue the judicial enforcement of their rights, choreographers have effectively prevented the courts from even having the opportunity to make such a decision.

3. STATUS AS A "FIXED" WORK

The Copyright Act requires that works of authorship be fixed in some tangible medium before they can be entitled to statutory copyright protection.⁶⁰ Because dance is, in essence, an intangible work of art that lives primarily through performance instead of through recordation,⁶¹ the fixation requirement creates a formidable obstacle to the registration of choreographic works.

Two methods are currently available⁶² for the fixation of dance: notation⁶³ and audiovisual preservation.⁶⁴ Yet choreographers find neither one of these methods entirely satisfactory. Because notation is a difficult and little known language, it requires the services of a specially trained expert⁶⁵ and is therefore

from the unique "personal reaction of an individual upon nature." *Id.* at 250.

60. "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (Supp. V 1981).

61. The late George Balanchine viewed his ballets as "butterflies" destined to live for a season. In answer to a question concerning the preservation of his ballets, Balanchine once remarked, "They don't have to be preserved. Why should they be? I think ballet is NOW. It's about people who are NOW. Not about what will be. Because as soon as you don't have these bodies to work with, it's already finished." Balanchine, *Work In Progress*, in *DANCE AS A THEATRE ART* 187, 192 (S. Cohen ed. 1975).

62. Scientists are now experimenting with a third alternative: programming computers to create visual displays of dance. At least one such computerized program will soon be available to the public. Eddie Dombrower, a video games designer for Mattel Electronics, has produced a *Dance on Microcomputers* program, which allows the viewer to see an animated dancer from all angles at regular speed, in slow motion, and by freeze frame. *Computer Choreographs Dance Steps*, *PERSONAL COMPUTING*, June 1983, at 215. See generally Minosky, *Video Graphics & Grand Jets*, *SCIENCE* 82, May 1982, at 25.

63. The two major types of notation systems are Labanotation and Benesh Notation. Although they differ greatly in appearance, both work with a basic staff noted with symbols that designate with extreme accuracy not only body positions and movements but also time and space allocations. See R. BENESH & J. BENESH, *AN INTRODUCTION TO BENESH DANCE NOTATION* (1955). The Dance Notation Bureau is able to record some twenty-five dances per year and currently boasts a library of over three hundred Labanotated scores. Of these three hundred scores, forty-one are registered with the Copyright Office. Information supplied by Pat Rader, Dance Notation Bureau Librarian.

64. Choreography can be preserved on either film or tape.

65. The Dance Notation Bureau offers an extensive training program in Labanotation

quite expensive.⁶⁶ Furthermore, although notation can reflect the most subtle nuances of movement,⁶⁷ it does not capture style or individual interpretation.⁶⁸ Finally, because the notation method is not readily visual, it is not always a convenient rehearsal or reconstruction tool. As a result, many choreographers forego fixation of their works in notated form.

Visual preservation, though less expensive than notation, may likewise be beyond the budget of a struggling choreographer.⁶⁹ Al-

that reaches an estimated two hundred students per year. In addition, approximately ninety-five schools nationwide offer courses in notation. However, the percentage of dancers skilled in notation remains low.

66. It has been estimated that the cost of initial notation will range from \$1200 to \$2400 for an "average" ballet, while the cost of reconstructing a dance from notation ranges from \$1000 to \$1200. Comment, *Unraveling the Choreographer's Copyright Dilemma*, 49 TENN. L. REV. 594, 605-06 n.52 (1982). The cost varies according to the length of the dance and the novelty of the steps involved. For example, a classical ballet that employs standard combinations is easier and therefore less expensive to notate than is a modern work that uses experimental movements. Kibbee, *Copyright Protection for Choreography*, ARTS & THE LAW, Jan. 1976, at 1, 4. Occasionally the high cost of notation is defrayed by grants or donations. Recently, for example, the Dance Notation Bureau received a \$40,640 grant from the National Endowment for the Humanities to notate six Antony Tudor ballets. *Footnotes*, BALLET NEWS, April 1982, at 10.

67. Hutchinson, *Preservation of the Dance Score Through Notation*, in THE DANCE HAS MANY FACES 151, 161 (W. Sorell ed. 1966); see also Balanchine, *Preface to A. HUTCHINSON, LABANOTATION* at xi-xii (1970) [hereinafter cited as *Preface*]. Indeed, Labanotation can record choreography so precisely that a ballet, such as Balanchine's "Symphonie Concertante" (originally performed in 1945) can be reconstructed accurately by someone who has never even seen the ballet performed. When American Ballet Theatre (ABT) artistic director Mikhail Baryshnikov decided to revive "Symphonie Concertante," which had not been performed since November 1952, he discovered that neither Balanchine nor any of his assistants remembered the ballet well enough to restage it. Aside from a few still photographs and some "vague verbal descriptions," all that remained of the ballet was a Labanotation score. Baryshnikov nevertheless asked for and received Balanchine's permission to perform the ballet. Balanchine sent Labanotator Gretchen Schumacher (a former ABT dancer) to ABT to help in the reconstruction process. Schumacher had never seen "Symphonie Concertante," but by studying the written score intensively (she likened the process to the way a conductor studies a musical score) she succeeded in accurately reconstructing the individual steps and then demonstrating them to the company dancers. Since its premier in early 1983, both critics and the public have warmly received the revival. See Kriegsman, *ABT's Return & the Rebirth of a Ballet*, The Wash. Post., Jan. 16, 1983, at G1, 2, col. 2; Reiter, *Restored to Life*, BALLET NEWS, June 1983, at 19.

68. Hutchinson, *supra* note 67, at 161.

69. Most choreographers who elect to fix their works in audiovisual form choose tape. Although the tape is not as expensive as notation, the costs still mount up. The choreographer may purchase his own equipment, which will cost him a minimum of \$1200 per set. Tapes cost approximately \$15 a piece. Alternatively the choreographer can hire a professional. Initial taping costs will run from \$70-100 per hour, and additional charges of \$70-100 per hour may be levied if editing is required. These estimates were supplied by Mr. John Freeman of ViGard, Inc., Miami, Florida.

though film captures style,⁷⁰ its range is limited. First, it offers only moving images, which are not very useful to the choreographer or reconstructor wishing to observe isolated movements.⁷¹ Second, film cannot convey the three dimensional nature of dance.⁷² Finally, unless the film is shot from the back instead of from the audience's point of view, the film provides a mirror image of the dance, reversing left and right.⁷³ Thus, many choreographers, particularly those who have not achieved financial success, pass up visual fixation as an unnecessary luxury.

Even those choreographers who have both the desire and the resources to fix their works may find it a mixed blessing. Under the 1976 Act, statutory protection does not attach unless and until a work is fixed.⁷⁴ Unfixed works are expressly left to common law copyright protection.⁷⁵ So long as the work remains unfixed and unpublished, this protection is of perpetual duration.⁷⁶ Statutory protection, on the other hand, lasts for a maximum of life of the choreographer plus fifty years.⁷⁷ Upon the termination of statutory

70. Indeed, some believe that film captures little else. See, e.g., Martin, *Dance on Film*, in *THE DANCE HAS MANY FACES* 164, 167 (W. Sorell ed. 1966).

71. See *Preface*, *supra* note 67. That film augmented by notes may not even be an accurate reconstruction tool in some circumstances is demonstrated by the recent ABT revival of Balanchine's "Bourree Fantasque." After "Bourree" left the New York City Ballet repertoire in the 1950s, all that remained of the ballet was a film of the ballet that lacked a musical sound track and "basic choreology" (the Dance Notation Bureau does list "Bourree" in its catalogue of Labanotated dances, but it is not clear whether this score was used in the ABT reconstruction). The dance was reconstructed from these sources and was presented to Balanchine, who refined and then approved the reconstruction. After the ballet opened, however, a photograph was discovered that indicated a larger cast had been used in the original. ABT then added two dancers to the second movement and four to the third to restore the original patterns. *The Ballet That Almost Wasn't*, ON POINT, Summer 1982, at 2, 12.

72. Hutchinson, *supra* note 67, at 160. Peter Martins recently described this problem as it related to television productions. According to Martins, "What it boils down to, is that there is no space in television. . . . [W]hen you make a dance for the stage, you work with a straight line, a circle, a semicircle, a diagonal. There are the options. On television, these options become totally distorted." Gruen, *Dancevision*, DANCEMAGAZINE, Sept. 1983, at 100, 100.

73. Hutchinson, *supra* note 67, at 160.

74. 17 U.S.C. § 102(a).

75. 17 U.S.C. § 301(b)(1).

76. See, e.g., *Goldstein v. California*, 412 U.S. 546 (1973).

77. 17 U.S.C. § 302(a). This section applies to works created on or after January 1, 1978. Works created but not published or copyrighted prior to January 1, 1978 are also granted protection for life plus fifty years. 17 U.S.C. § 303. Works that were copyrighted prior to January 1, 1978, and that were still in their first term on that date are entitled to the full first term of twenty-eight years plus an elective renewed term of forty-seven years. 17 U.S.C. § 304(a). Works that were copyrighted prior to January 1, 1978, and that were in their renewal term on that date are entitled to protection for a term of seventy-five years

protection, the work falls into the public domain.⁷⁸ The choreographer who fixes his works, therefore, effectively deprives his future heirs of unlimited control and use of his dances.⁷⁹

B. *Economic Nature of Rights Secured Under the Copyright Act*

Because the 1976 Act requires that dance satisfy statutory and judicial notions of choreography, originality, and fixation before they can be registered, some choreographers have rejected the registration process. Others, however, have decided to bear the risks of obtaining statutory registration. Those who do register their works may then enforce their statutory rights in a court of law.⁸⁰ However, they may be disappointed in the range and nature of rights that accompany judicial enforcement of registration. For the primary interest of choreographers in maintaining the artistic integrity of their works conflicts with the Copyright Act's favoring of economic benefits at the expense of artistic concerns.

According to the Supreme Court, the basis of the copyright clause of the Constitution is "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talent of authors. . . ."⁸¹ Guided by that philosophy, the drafters of the 1976 revision chose to limit copyright protection to certain economic rights:

- (1) to reproduce the copyrighted work . . .
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies . . . of the copyrighted work to the public . . .
- (4) . . . to perform the copyrighted work publicly; and
- (5) . . . to display the copyrighted work publicly.⁸²

from the date the copyright was originally secured. 17 U.S.C. § 304(b).

78. That is, it is no longer subject to any one person's ownership or control. Once a work has become part of the public domain, anyone is free to use the work. *See, e.g., Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774).

79. The works of the late Mikhail Fokine provide a good illustration of this point. Working primarily with archival tapes, the Fokine family has registered many of his works. Because Fokine died in 1942, statutory protection will expire in 1992. As a result, these works will soon fall into the public domain. Had the dances never been fixed, the Fokine family arguably could have controlled the use of these pieces well into the 21st century and beyond.

80. 17 U.S.C. § 411(a).

81. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

82. 17 U.S.C. § 106 (Supp. V 1981).

Of these economic rights, only performance and derivation have current value to the average choreographer. Although the other copyrights may prove valuable at some future time, at present they are only of minor concern to most choreographers.

1. PERFORMANCE AND DERIVATIVE RIGHTS

A dance lives primarily through a dancer's interpretation. The choreographer, therefore, will be vitally concerned with the circumstances surrounding each performance of his work. The Copyright Act guarantees to each choreographer who registers his work the exclusive right to control all public presentations of that work, whether direct or indirect (e.g., through television broadcast),⁸³ and whether or not for profit.

The Act also guarantees the registering choreographer the exclusive right to control derivations based on his work.⁸⁴ A derivation includes any recasting, transformation, or adaption of the original work.⁸⁵ Any revival or restaging of a work that includes significant changes made to accommodate modern dancers or modern styles constitutes a derivative work instead of a simple performance. In light of the current popularity of mounting new and innovative productions of old and classical dances,⁸⁶ the value of derivative rights to all choreographers, both those who create the original works and those who wish to restage them, is obvious.

When violation of either of these two rights occurs, the Act gives the copyright owner the choice of injunctive relief or money damages.⁸⁷ The choreographer who is able to act before the unlicensed performance of his work therefore has the power to prevent such a performance. Otherwise, his remedy is limited to damages measured by lost profits⁸⁸ (along with possible injunctive relief to prevent further violations). Unfortunately, a recovery based on lost profits may provide little comfort to the average choreographer, who makes little profit on the performance of his work.

83. Subsection (4) of 17 U.S.C. § 106 provides for control over public performance, whereas subsection (5) relates to public display. As to choreographic works, the difference would be between live and recorded presentations.

84. 17 U.S.C. § 106(2).

85. 17 U.S.C. § 101.

86. Recent examples include Erik Bruhn's restaging of "La Sylphide" for the American Ballet Theatre and Rudolf Nureyev's revival of "Don Quixote."

87. 17 U.S.C. §§ 502, 504 (Supp. V 1981).

88. *Id.* § 504(b). The choreographer may elect to receive statutory damages, which may be for not less than \$250 and not more than \$10,000. The amount of such damages awarded lies within the court's discretion. *Id.* § 504(c).

2. PREPARATION, SALE, AND DISPLAY OF COPIES

Whenever a choreographer fixes his work, a copy results. The Act ensures that the preparation and distribution of any such copies will be controlled by the owner of the copyright in the fixed work.⁸⁹ Because the dance market currently focuses on live presentation, the value of these remaining rights to most modern choreographers is limited. Nevertheless, several of the more innovative and successful choreographers, such as Merce Cunningham and Twyla Tharp, have begun to experiment by creating dances specifically designed for audiovisual display.⁹⁰ In addition, the home video recorder business is creating a new and potentially lucrative market for dance films and tapes.⁹¹

The Copyright Act thus secures economic rights that may prove valuable to choreographers, or at least to the successful few. The popular choreographer can license the right to perform or stage a derivative version of his work and earn a small profit. He can also sell these rights and earn a greater profit, but the consequence is the loss of further control over those aspects of his work.

The securing of these rights, however, fails to entice most choreographers to register their works under the Act. First, the custom of the dance community already guarantees choreographers the same economic rights. Second, these economic rights are not of paramount importance to most choreographers. Because the average choreographer will never reap financial gain from his creative endeavors, his creative impetus must stem from other factors: the desire to express or communicate.⁹² And because his primary moti-

89. *Id.* § 106(2), (3).

90. Cunningham has collaborated with Charles Atlas to produce several films and video tapes that can be rented or purchased. Kostelenetz, *Cunningham Revisited*, DANCEMAGAZINE, July 1982, at 57, 59. Tharp has produced several made-for-television ballets. Her latest endeavor, "The Catherine Wheel," includes computerized animation, optical effects, and other editing tricks. See Siegel, *The World According to Tharp*, DIAL MAG., Mar. 1983, at 44; Vaughan, TV, BALLET NEWS, June 1983, at 43. Note also that Transmedia Communications Network, the Metropolitan Opera Guild, and Ballet News are collaborating with notables of the ballet world to produce a "Video Dictionary of Ballet," which will contain 150 entries and will soon be available on videodisc. *Footnotes*, BALLET NEWS, Aug. 1983, at 6, 6.

91. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984). In *Sony*, the Supreme Court held that home videotaping of broadcast copyrighted works does not constitute copyright infringement.

92. That money is not always the motivating factor for the choreographer is evident from remarks made by Eliot Feld as he recently described the American Ballet Theatre. According to Feld, "[t]hey wanted to buy things, to make a clear exchange, so I would have the money, and they would have the ballet. I always found that objectionable." Reiter, *His Own Man*, BALLET NEWS, June 1982, at 11, 13.

vation is not money but instead the need to make an artistic statement,⁹³ his primary concern is not with the economic rights secured by the statute. Instead, it is the artistic or "moral" rights omitted from the Act's aegis—but included in the rights recognized by the custom of the dance community that is a choreographer's primary concern.

IV. LEGISLATIVE AND JUDICIAL RECOGNITION OF THE CHOREOGRAPHER'S ARTISTIC RIGHTS

The 1976 Copyright Act is the primary mechanism currently available for protecting creative works. Yet, because the Act protects only economic rights, it denies American choreographers legal recognition of their artistic rights. This lack of legal recognition is not always a serious problem for choreographers. Lawmakers and lawyers, however, continue to believe that legal recognition is essential to the preservation of choreographic rights. Such recognition could be achieved in two ways: first, the Copyright Act should incorporate the European notion of moral rights, and second, the recognition and the enforcement of artistic rights could be delegated to the courts. Both of these alternatives have some merit. Nevertheless, as the following discussion demonstrates, both possess flaws serious enough to suggest that legal recognition of the choreographer's artistic rights is neither likely in the near future nor absolutely essential to the preservation of choreographers' rights.

A. *Legislative Recognition of Moral Rights*

Although Congress has chosen to rely solely on economic incentives for the stimulation of creative endeavors, legislatures of other nations have recognized, in addition to economic rights, the creative, moral rights, which are equally, if not more, important to an artist's career.

Parties to the Berne Copyright Convention⁹⁴ acknowledge that, as well as financial reward,⁹⁵ creators desire and deserve the

93. See, e.g., T. BENTLEY, WINTER SEASON 33 (1982) ("We dancers are dedicated to the art, not the money.")

94. Berne Convention of the International Union for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris, July 24, 1971, 3 COPYRIGHT LAWS AND TREATIES OF THE WORLD (BNA) (1972 Supp.). At present some 53 nations are parties to the Convention. *Id.* The United States, however, is not a party.

95. The Convention recognizes the following economic rights: Cinematographic reproduction (Art. 14), derivation (Arts. 12 and 14), distribution (Arts. 11 and 14), performance

fame and acclaim gained through public recognition of the artistic merit of their creative endeavors. The Convention secures to authors, including choreographers,⁹⁶ a set of personal, artistic rights that exist independently of any transfer of the copyrighted work or the economic rights derived therefrom.⁹⁷

Parties to the Convention have incorporated this recognition of moral rights in domestic copyright legislation. These rights divide into two categories: "paternity" rights and "integrity" rights. Paternity rights include,

- (1) the right to be known publicly as the author of a work,⁹⁸
- (2) the right to prevent someone else from claiming authorship of that work,⁹⁹ and

(Arts. 11 and 11 *ter*), and display of cinematographic reproductions (Art. 14).

96. Article 2(1) of the Convention expressly extends these rights to choreographic works.

97. The Convention provides that:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercised by the persons or institutions authorized by the legislation of the country where protection is claimed

Convention, *supra* note 94, art. 6bis.

For further discussion of the scope of these rights as applied to artists, see Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554 (1940); Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955); Comment, *An Artist's Personal Rights in His Creative Works: Beyond the Human Cannonball and the Flying Circus*, 9 PAC. L.J. 855 (1978).

98. For an example of recognition of this right, see Copyright Act R.S., CAN. REV. STAT. ch 55, § 12(7) (1970); Propriete litteraire et artistique, CODE CIVIL art. 543 (6) (Petits Codes Dalloz 1979) (France); CODICE CIVILE art. 2575-2583 (1976) (Italy). See also Brazil, Colesão, art. 667 (1958), and Law on the Rights of Authors and Other Provisions, art. 25(i) (1973); Chile, Law No. 17.336 on Copyright, art. 14(1) (1972); Denmark, Law No. 158 of 1961 on Copyright in Literary and Artistic Works § 3 (1977); Egypt, Law relating to the Protection of Copyright, art. 1 (1975); France, Law No. 57-298 on Literary and Artistic Property, art. 6 (1957); German Democratic Republic, Copyright Act § 14(1) (1965); Italy, Law No. 633 of Apr. 22, 1941, for the Protection of Copyright and Other Rights, art. 20 (1979); Japan, Law No. 48 of 1970, art. 19(1) (1978); Lebanon, Decree Providing Regulation of Commercial and Industrial Property Rights in Syria and Lebanon, art. 146 (1946); Mexico, Federal Law of Copyright, art. 2(I) (1963); Norway, Act Relating to Property Rights in Literary, Scientific or Artistic Works § 3 (1977); U.S.S.R., Fundamentals of Civil Legislation, ch. 4, art. 98 (1976); Venezuela, Law Relating to Copyright, art. 20 (1962). All of the above provisions are printed in 1, 2, & 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1982). See also Israel, Copyright Ordinance (Amend. No. 4) Law, 5741-1981, art. 3 (1981), printed in *Copyright*, Oct. 1981 (World Intellectual Organization, pub.).

99. For examples of recognition of this right see Copyright Act 1968-1973, AUSTRAL. ACTS

(3) the right to prevent one's own name from being associated with the work of a third party or with one's own work that has been altered or distorted without consent.¹⁰⁰

Paternity rights are of obvious value to choreographers. The success of a choreographer's career depends on how the public perceives his works.¹⁰¹ Thus, choreographers are eager for the permanent attachment of their names to the works that they successfully present to the public.¹⁰² And because choreographic works are so reflective of the individual choreographer's personality, each choreographer is eager to have only those works that spring from his own creative process attributed to him.

Moral rights also include "integrity" rights: (1) the right to prohibit or control alterations of one's works;¹⁰³ and (2) the right

P. 1901-1973, § 190(1) (1974); Ireland, Copyright Act 1963, OIREACHTAS ACTS, art. 54(2) (1963). See also Brazil, Coesão art. 667 § 1 (1958); Lebanon, Decree Providing Regulation of Commercial and Industrial Property Rights in Syria and Lebanon, Decree Providing Regulation of Commercial and Industrial Property Rights in Syria and Lebanon, art. 145 (1946). All of the above provisions are printed in 1 & 2 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1982). See also Israel, Copyright Ordinance (Amend. No. 4) Law, 5741-1981, art. 3 (1981), printed in *Copyright*, Oct. 1981 (World Intellectual Property Organization, pub.).

100. For examples of recognition of this right, see Copyright Act, 1956, 4 & 5 Eliz. 2 ch. 74, § 43. See also Denmark, Law No. 158 of 1961 on Copyright in Literary and Artistic Works § 51 (1977); Norway, Act Relating to Property Rights in Literary, Scientific or Artistic Works § 47 (1977); Syria, Decree Providing Regulation of Commercial and Industrial Property Rights in Syria and Lebanon, art. 169 (1946). All of the above provisions are printed in 1, 2 & 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1982).

101. See, e.g., *Poe v. Michael Todd Co.*, 151 F. Supp. 801, 803 (S.D.N.Y. 1957) ("[a] writer's reputation, which would be greatly enhanced by public credit for authorship of an outstanding picture, is his stock in trade . . .").

102. Classics of the dance world are often referred to by both title and creator: e.g., Tudor's "Pillar of Fire," Taylor's "Airs."

103. For an example of recognition of this right, see Copyright Act R.S., CAN. REV. STAT. ch. 55, § 12(7) (1970); C. C. art. 2582 (1976) (Italy). See also Argentina, Law No. 11.723 on Copyright, art. 51 (1973); Austria, Copyright Act § 21(1) (1980); Brazil, Law on the rights of Authors and Other Provisions, art. 25(iv) (1973); Chile, Law No. 17.336 on Copyright, art. 14(2) (1972); Denmark, Law No. 158 of 1961 on Copyright in Literary and Artistic Works § 3 (1977); Egypt, Law relating to the Protection of Copyright, art. 9 (1975); Federal Republic of Germany, Copyright Act, art. 23, 39 (1965); German Democratic Republic, Copyright Act § 16 (1965); Greece, Legislative Decree No. 2179/1943, art. 15 (1943); Italy, Law No. 633 of Apr. 22, 1941, for the Protection of Copyright and Other Rights, art. 20 (1979); Japan, Law No. 48 of 1970, art. 20(1) (1978); Lebanon, Decree Providing Regulation of Commercial and Industrial Property Rights in Syria and Lebanon, art. 146 (1946); Mexico, Federal Law of Copyright, art. 2 (II) (1963); Spain, Regulations for the Application of the Law of Jan. 10, 1879 concerning Intellectual Property, art. 5 (1919); Venezuela, Law Relating to Copyright, art. 21 (1962); U.S.S.R., Fundamentals of Civil Legislation, ch. 4, art. 98 (1976). All of the above provisions are printed in 1, 2 & 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1982). See also Israel, Copyright Ordinance (Amend. No. 4) Law, 5741-1981, art. 3 (1981), reprinted in *Copyright*, Oct. 1981 (World Intellectual Prop-

to unilaterally withdraw the work from the public.¹⁰⁴

Integrity rights are also valuable to choreographers, who jealously guard the fruits of their creativity. For most choreographers, the creative process is difficult and time-consuming.¹⁰⁵ The choreographer spends weeks, sometimes months, carefully nurturing his creation. He regards his work as a child that must be watched and controlled even after its introduction to the public. Those performing or presenting the work cannot be allowed to make unauthorized changes. But the choreographer himself must retain the freedom to revise¹⁰⁶ or withdraw¹⁰⁷ the work whenever aesthetic or practical reasons dictate.

Legislation enacted under the guidelines established in the

erty Organization, pub.).

104. See, e.g., Propriete litteraire et artistique, C. Crv. art. 543(32) (Petits Codes Dalloz 1979) (France). See also the following statutes, printed in 1, 2 & 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1982), for the recognition of this right: Brazil, Law on the Rights of Authors and Other Provisions, art. 25(vi) (1973); Federal Republic of Germany, Copyright Act, art. 42 (1965); France, Law No. 57-298 on Literary and Artistic Property, art. 32 (1957); Spain, Regulations for the Application of the Law of Jan. 10, 1879 concerning Intellectual Property, art. 81 (1919).

105. See *supra* note 19 & 20.

106. As George Balanchine explained, "I can do with my ballets whatever I like. They are mine . . . I made them, and I can change them if I want to." DANCEMAGAZINE, Apr. 1981, at 85. The transformation of Balanchine's seminal ballet, "Apollo," illustrates the extent of the choreographer's control. Balanchine related, "I was with [Serge] Diaghilev and it was 1927. [Igor] Stravinsky came with a story about Apollo. . . . It was in two parts. The first part was the birth of Apollo and the second part was about Apollo and the Muses." DANCEMAGAZINE, Apr. 1981, at 85. When first performed under the title of Apollon-Musegete in Paris in 1928 the ballet contained both parts and was a critical success. In 1979, however, Balanchine reevaluated the ballet and decided to make substantial changes in it. "So, slowly I undressed the muses—I changed things. Recently I looked at Apollo. I looked at the birth scene. I decided it wasn't interesting . . . Then I remembered the mountains in the second part. I thought, Who cares about mountains? Mountains aren't interesting. So I took them away. . . . You see, all of that is unimportant. What is important is the dancing . . . only the dancing!" *Id.* at 86-87. The streamlined ballet represents an even purer classicism than did the original.

107. That choreographers believe that they are entitled to withdraw works is demonstrated by actions taken by George Balanchine. When the Pennsylvania Ballet forced its artistic director, Barbara Weisberger, to resign in February 1982, Balanchine promptly notified the company that he intended to withdraw his ballets from the company's repertoire. Balanchine explained that he had originally given the works to Weisberger (a Balanchine protegee), and since she was no longer in charge of "her" company, he did not wish to have his ballets performed by them. BALLETS NEWS, Aug. 1982, at 8. The recent appointments of former New York City Ballet principal Robert Weiss as artistic director and current NYCB principal Peter Martins as artistic advisor appear to have solved the problem. According to Weiss, "when I told Balanchine [about the appointment], he said he was happy for me, and whatever ballets I wanted, I could have." BALLETS NEWS, Oct. 1982, at 9. Balanchine also withdrew works from the Pacific Northwest Ballet when former NYCB principal Melissa Hayden left that company. Balanchine reinstated the works, however, when former NYCB ballet mistress Francia Russell joined the PNB. BALLETS NEWS, Aug. 1982, at 8.

Berne Convention acknowledges the artist's pocketbook and his pride in his creative talents. In doing so, this legislation provides a far more effective stimulus to the creative process than does the current American Copyright Act.

The inclusion of moral rights in the Copyright Act would provide choreographers with a more comprehensive method of protecting their works. Yet, Congress has steadfastly refused to incorporate these rights into the Act. Legislation providing for the incorporation of moral rights in the act has been repeatedly introduced and rejected: the first bill was introduced as early as 1940,¹⁰⁸ the last was rejected as late as 1981.¹⁰⁹ In light of Congress's long-standing opposition to the recognition of the artist's moral rights, it seems unlikely that legislative reform will soon provide protection for the artistic rights of American choreographers.

B. *Judicial Recognition of Moral Rights*

Although Congress has consistently declined to acknowledge moral rights, certain American courts have admitted the importance of these rights as necessary and proper adjuncts to the creative process. One court recently stated that "[t]he economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law . . . cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their works to the public on which the artists are financially dependent."¹¹⁰ Despite the hesitancy of courts in adopting the panoply of moral rights, they afforded sporadic enforcement of most aspects of paternity and integrity rights.¹¹¹ And al-

108. The Shotwell Bill provided, inter alia, that "Nothing in this Act . . . shall be deemed to alter or in any manner impair any legal or equitable right or remedy of an author . . . to claim the paternity of his work as well as the right to object to every deformation, mutilation, or other modification of the said work which may be prejudicial to his honor or to this reputation." S. 3043, 76th Cong., 3rd Sess. § 5 (1940), as quoted in Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 CAL. L. REV. 375, 419 (1951).

109. In 1977, Congressman Robert Drinan introduced legislation to give fine artists the moral rights to claim authorship, and to object to any distortion, mutilation, or other alteration of his work. H.R. 8261, 95th Cong., 1st Sess. (1977). In 1981 Congressman Barney Frank introduced a similar bill, which was referred to the Judiciary Committee. H.R. 2908, 97th Cong., 1st Sess. (1981). Although Congress has failed to act in this area, in 1979 the California legislature enacted the California Art Preservation Act. CAL. CIV. CODE § 987 (West 1982). The Act prohibits physical defacement, mutilation, alteration, or destruction of a work of fine art by anyone except its artist who owns and possesses it. *Id.* § 987(c)(1).

110. *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (citations omitted).

111. Although the 1976 Revision preempts state law remedies that are equivalent to

though no court has yet applied the doctrine of moral rights specifically to choreographers and their works, the principles enunciated in the following cases apply equally to all creative artists.

1. PATERNITY RIGHTS

Early judicial recognition of the intrinsic worth of public credit appeared in *Clemens v. Press Publishing Co.*¹¹² Although the court ultimately refused to award the author damages for the publisher's failure to print the author's name with his story,¹¹³ the court admitted that "[t]he fact that he is permitted to have his work published under his name, or to perform before the public, necessarily affects his reputation and standing and thus impairs or increases his future earning capacity."¹¹⁴

Courts have also acknowledged the artist's right to prevent others from being credited with creation of his works. In *Nelson v. Radio Corporation of America*,¹¹⁵ the plaintiff vocalist had re-

those secured under the Act, 17 U.S.C. § 301(a), state courts are free to adjudicate violations of artistic rights if either one of two exceptions apply. First, subject matter that does not come within the definition of copyrightable works (§ 102) is still left to the aegis of the common law and state statutes. This includes all unfixed works. § 301(b)(1). Those choreographic works that are not fixed, therefore, remain protected by common law copyright and/or state law.

Second, state court remedies that are not equivalent to those secured by the Act are not preempted. § 301(b)(3). The Act fails to specify exactly which state actions are preserved. However, draft versions of § 301 did set out certain causes that would not be subject to preemption. The 1976 Senate Bill, for example, sought to preserve the following state actions: misappropriation not equivalent to statutory rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation. S. 22, 94th Cong., 2d Sess. § 301(b)(3) (1976). Nimmer suggests that under the current act "state laws of unfair competition (of the passing off variety), or of defamation, invasion of privacy, or the state law of contracts" will not be preempted. 2 M. NIMMER, NIMMER ON COPYRIGHT 8-248 n.8 (1963). For a general survey of the preemption problem, see Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. REV. 1070 (1977); Fetter, *Copyright Revision and the Preemption of State "Misappropriation" Law*, 25 BULL. COPYRIGHT SOC'Y 367, item 510 (1978); Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 U.C.L.A. L. REV. 1107 (1977); Comment, *Preemption of State Unfair Competition Protection Under the Proposed Copyright Revision*, 41 U. COLO. L. REV. 115 (1969). Because moral rights are not included in the list of enumerated statutory rights, it would appear that state law actions to protect these rights will not be preempted under § 301.

112. 67 Misc. 183, 122 N.Y.S. 206 (Sup. Ct. 1910).

113. The court denied plaintiff's claim on the ground that he failed to retain the right to credit when he unconditionally submitted his story to the defendant for publication.

114. 67 Misc. at 184, 122 N.Y.S. at 208 (Seabury, J., concurring). *But see* Zorich v. Petroff, 152 Cal. App. 2d 806, 313 P.2d 118 (1957) (failure to receive screen credit for an unsuccessful film could actually be a benefit, rather than a detriment, to an author).

115. 148 F. Supp. 1 (S.D. Fla. 1957).

corded certain songs incorporated into an album issued by the defendant record company. Not only had the record company omitted the plaintiff's name from the album, the company had also wrongfully attributed authorship of songs recorded by the plaintiff to another vocalist. Although the court held that the plaintiff had contracted away his right to receive credit on the album, it nevertheless agreed that the plaintiff could require the improper attribution to be removed from subsequent editions of the album.

Courts have further recognized the harm that can result from incorrect attribution of an author's name to works not created by the author or substantially departing from his original work.¹¹⁶ In *Kerby v. Hal Roach Studios*,¹¹⁷ the defendant attempted to advertise a movie by mailing to 1000 men a sexually suggestive, handwritten letter bearing the apparent signature of the plaintiff actress.¹¹⁸ The plaintiff, who had no connection with the writing or the publication of the letter, sued the studio for invasion of her right of privacy. The court sustained her action, explaining that attributing authorship of the letter to the plaintiff imputed to her "a laxness of character, a coarseness of moral fibre. . ."¹¹⁹ Such an attribution adversely affected her good reputation and, therefore, constituted an invasion of privacy.

Harm can also result from attributing an artist's name to an unauthorized, truncated version of the artist's work. The court in *Granz v. Harris*¹²⁰ held that although the purchaser of the plaintiff's master record discs could lawfully use, produce, and sell abbreviated versions of the records, he could not publicly attribute them to the plaintiff without express contractual authorization. To do so would constitute unfair competition. Similarly, the court in *Big Seven Music Corp. v. Lennon*¹²¹ upheld an action brought by John Lennon under New York law¹²² for damages caused by the

116. See *Geisel v. Poynter Products, Inc.*, 295 F. Supp. 331, 354 (S.D.N.Y. 1968).

117. 53 Cal. App. 2d 207, 127 P.2d 577 (1942).

118. The letter, which was written on pink stationery, said, among other things, "[w]ell, I'm raring to go again, and believe me I'm in the mood for fun. Let's renew our acquaintanceship [sic] and I promise you an evening you won't forget." 53 Cal. App. 2d at 208-09, 127 P.2d at 579.

119. 53 Cal. App. 2d at 212, 127 P.2d at 581.

120. 198 F.2d 585 (2d Cir. 1952).

121. 554 F.2d 504 (2d Cir. 1977).

122.

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait

unauthorized release of an album containing Lennon recordings. The court acknowledged Lennon's entitlement to compensation for the release of the album, which was "shoddy and fuzzy, with one out-of-tune track and indistinct voices in some places . . ."¹²³

2. INTEGRITY RIGHTS

American courts have also noted the importance of artists' integrity rights.¹²⁴ As the court explained in *Preminger v. Columbia Pictures Corp.*,¹²⁵ "the law is not so rigid . . . as to leave a party without protection against publication of a garbled version of his work."¹²⁶

The court's decision in *Gilliam v. American Broadcasting Cos.*¹²⁷ underscores the role that integrity rights play in the crea-

or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation . . . from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976).

123. 554 F.2d at 512; *see also* Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 A.D. 632, 107 N.Y.S.2d 795 (App. Div. 1951); *Noone v. Banner Talent Assoc.*, 398 F. Supp. 260 (S.D.N.Y. 1975); *Baez v. Fantasy Records, Inc.*, 144 U.S.P.Q. (BNA) 537 (Cal. Sup. Ct. 1964). In *Metropolitan Opera*, the court enjoined the defendants from the unauthorized making, selling, and attributing to the plaintiff of Opera records made from radio broadcasts of the Opera's performances. The court recognized the right to the exclusive use of one's own name and reputation and held that unauthorized recording and distribution of the performances under the Opera's name would injure its good public reputation.

The court in *Noone* held that the plaintiff vocalist could sue under the Lanham Act to enjoin his former back-up band from using the name "Herman's Hermits" because that name had acquired a sufficient secondary meaning to imply that the plaintiff was still associated with the group. The *Baez* court went so far as to enjoin the unauthorized distribution of certain early Joan Baez recordings under the singer's name. The court reasoned that these recordings, "made at a time when plaintiff was an immature and inexperienced singer and guitarist . . . [do] not fairly or at all represent plaintiff's ability." 144 U.S.P.Q. (BNA) at 538.

124. *See, e.g.*, *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. (BNA) 755 (Cal. Sup. Ct., 1966).

125. 49 Misc. 2d 363, 267 N.Y.S.2d 594 (Sup. Ct. 1966), *aff'd*, 25 A.D.2d 830, 269 N.Y.S.2d 913 (1966), *aff'd*, 18 N.Y.2d 659, 219 N.E.2d 431, 273 N.Y.S.2d 80 (1966).

126. 49 Misc. 2d at 366, 267 N.Y.S.2d at 599. The plaintiff, Otto Preminger, brought the suit to enjoin the defendant from cutting *Anatomy of a Murder* to accommodate television commercials. The court held that Preminger had not retained the right to control minor television editing and, therefore could not complain of the cuts made.

127. 538 F.2d 14 (2d Cir. 1976).

tive process. The plaintiff writers in *Gilliam* complained of substantial, unauthorized¹²⁸ editing of their "Monty Python's Flying Circus" programs.¹²⁹ The trial court found that the writers had "established an impairment of the integrity of their work' which 'caused the film or program . . . to lose its iconoclastic verve.'"¹³⁰ The appellate court noted that the truncated version of plaintiff's program "at times omitted the climax of the skits to which [plaintiffs'] rare brand of humor was leading and at other times deleted essential elements in the schematic development of a story line."¹³¹ Furthermore, the American Broadcast Company's [ABC] broadcast represented the plaintiffs' first exposure to an American audience. In the court's opinion, a misrepresentation of the quality¹³² of the plaintiffs' work might well deter many viewers from becoming Monty Python fans. The court therefore held the disputed mutilations as constituting false representation under the Lanham Act.¹³³

128. The British Broadcasting Corporation had granted ABC's predecessor in interest, Time-Life Films, the right to edit the Monty Python shows for commercial and censorship purposes. However, the original contract between the plaintiffs and the BBC as the original producer gave the latter no such rights. The BBC, therefore, was not authorized to transfer these rights to Time-Life Films and ABC.

129. Twenty-four minutes of an original ninety minutes of programming were omitted. The defendants claimed that some of the editing was done to make room for commercials while the rest was done to remove offensive or obscene material. 538 F.2d at 18.

130. *Id.* (quoting trial court record). Nevertheless, the lower court denied the plaintiffs' request for a preliminary injunction because, among other things, it was unclear who owned the copyright in the original program and ABC stood to lose a significant amount of money if its presentation were enjoined only one week before the scheduled air time.

131. 538 F.2d at 25. The court cited the following as an example of the distortion that occurred:

In one skit, an upper class English family is engaged in a discussion of the tonal quality of certain words as "woody" or "tinny." The father soon begins to suggest certain words with sexual connotations as either "woody" or "tinny," whereupon the mother fetches a bucket of water and pours it over his head. The skit continues from this point. The ABC edit eliminates this middle sequence so that the father is comfortably dressed at one moment and, in the next moment, is shown in a soaked condition without an explanation for the change in his appearance.

Id. at 25 n.12.

132. There appears to have been some doubt expressed at trial as to whether the cuts in question had actually had negative effects on the plaintiffs' reputation. The court is reported to have remarked "I thought that was your business, being fools," to which Monty Python member Michael Palin replied, "Well, on our own terms." Record, *Gilliam v. American Broadcasting Cos.*, Civ. No. 75-6256 (S.D.N.Y. Dec. 19, 1975), quoted in *THE NEW YORKER*, Mar. 29, 1976, at 69, quoted in Comment, *Monty Python and the Lanham Act: In Search of the Moral Right*, 30 *RUTGERS L. REV.* 452, 452 (1977).

133. 15 U.S.C. §§ 1051-1072, 1091-1096, 1111-1121, 1123-1127 (1976). This act provides in relevant part:

3. CONTRACTUAL MODIFICATION OF MORAL RIGHTS

Although American courts recognize the potential worth of moral rights to an artist's career, the courts nevertheless view these rights as subject to the terms of any licensing agreements negotiated by the artist.¹³⁴ An unconditional sale or license carries with it any moral rights originally held by the artist.¹³⁵ Thus, in *Vargas v. Esquire, Inc.*,¹³⁶ the plaintiff artist failed in his attempt to gain credit for drawings that he had unconditionally sold to Esquire Magazine. The artist claimed that, although the contract of sale included no express right to credit, the parties had an implied agreement that the magazine would not publish the drawings without crediting them to the artist. According to the court, the artist "by plain and unambiguous language completely divested himself of every vestige of title and ownership of the pictures, as well as the right to their possession, control and use."¹³⁷ Thus, the artist no longer had the right to demand credit for his drawings.

Similarly, in *Pushman v. New York Graphic Society*,¹³⁸ the court denied the plaintiff's request for an injunction against the publication of what the plaintiff deemed an inferior reproduction of his painting. Such a reproduction, the plaintiff claimed, would cheapen his reputation and the value of not only works already

Any person who shall affix, apply, or annex, or use in connection with any goods or services . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1976).

The *Gilliam* court stated that the Lanham Act will be violated by a representation that, while technically correct, creates a false impression of a product's origin. The editing in question was held to create such a false impression. See also *Geisel v. Poynter Products, Inc.*, 283 F. Supp. 261 (S.D.N.Y. 1968) (unauthorized use of Geisel's pseudonym, "Dr. Seuss," in connection with the advertising and sale of certain dolls constituted false representations of false designations of origin under the Lanham Act).

134. See, e.g., *Edison v. Viva Int'l, Ltd.*, 70 A.D.2d 379, 421 N.Y.S.2d 203 (1979).

135. *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949). Article 6*bis* of the Berne Convention does not address this question. Certain statutes enacted under the Convention, however, provide that moral rights are not alienable *inter vivos*. See, e.g., Brazil, Law on the Rights of Authors and Other Provisions, art. 28 (1973); Chile, Law No. 17.336 on Copyright, art. 16 (1972); France, Law No. 57-298 on Literary and Artistic Property, art. 6 (1957); Italy, Law No. 633 of Apr. 22, 1941, for the Protection of Copyright and Other Rights, art. 22 (1979); Japan, Law No. 48 of 1970, art. 59 (1970). All of the above provisions are reprinted in 1, 2 & 3 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (BNA) (1982).

136. 164 F.2d 522 (7th Cir. 1947).

137. *Id.* at 525.

138. 25 N.Y.S.2d 32 (Sup. Ct. 1941).

created but also yet to be created. The court held that the absolute sale and delivery of the painting constituted an abandonment of all of the artist's rights, including that of controlling reproduction.

The court's decision in *McGuire v. United Artists Television Productions, Inc.*¹³⁹ confirmed that the artist's right of creative control is lost absent express reservation by the artist. The plaintiff in *McGuire* relied on a custom of the film industry that allegedly ensured that the original producer of a film would retain creative control over the film throughout its entire life. Recognizing that such a custom might exist, the court nevertheless held that the failure to insert an express reservation of that right into the contract was fatal to the plaintiff's claim.¹⁴⁰

Some American courts are beginning to recognize the importance of moral rights in an artist's career. Yet these same courts steadfastly maintain that moral rights can be irretrievably lost by those who unwittingly or carelessly contract them away.¹⁴¹ In light of the courts' willingness to enforce such contractual waivers, judicial recognition of moral rights cannot provide choreographers with the complete and effective protection of their artistic rights that they so clearly need and desire.

V. CONCLUSION

American choreographers do not avail themselves of the security offered by statutory copyright protection because they see no clear benefits arising from registration under the Act. The fundamental desire of choreographers is the preservation of the artistic integrity of their works. But the Copyright Act only offers choreographers economic incentives. Even those choreographers who have achieved some measure of commercial success derive only limited benefit from those economic guarantees because every economic right initially secured by statutory copyright registration can be—and very often is—quickly conveyed away by the financially distressed choreographer. Ultimately, only the most successful choreographers, the Balanchines of the world, are financially success-

139. 254 F. Supp. 270 (S.D. Cal. 1966).

140. Contrast the *McGuire* court's decision to that of the court in *Gilliam*, 538 F.2d at 14, where the court upheld the plaintiffs' claim to artistic control partly because they had expressly reserved that right in their original contract.

141. Note also that even statutory moral rights can apparently be destroyed by contract. Although European legislation generally declares moral rights to be "inalienable," European courts nevertheless allow these rights to be waived or modified by contract. See Strauss, *supra* note 97, at 516-17.

ful enough to realize, retain, and capitalize on the economic rights offered by the Copyright Act.

Legislative recognition of moral rights could provide an avenue for the enforcement of the choreographer's artistic rights. Many European statutes expressly recognize the moral rights of creative artists. Some of these statutes even prohibit the contracting away of these rights.¹⁴² Congress, however, has repeatedly refused the incorporation of moral rights into the American Copyright Act. In light of this persistent refusal, it would be unrealistic to expect that American choreographers will benefit from legislative enforcement of their artistic rights in the foreseeable future.

Judicial recognition of moral rights could present choreographers with the opportunity to pursue the enforcement of their artistic rights. Indeed, some American courts have acknowledged the artist's plight and have been willing to grant common law recognition to moral rights. A few of these courts have even suggested that the Copyright Act must be reconciled with the independent existence of moral rights.¹⁴³ But these same courts have consistently held that choreographers can dispose of their economic copyrights as well as their moral copyrights by contract. By recognizing the artist's power to waive his moral rights, these courts have reduced these rights to nonexistence. Because of the uniform resistance of American courts in recognizing moral rights and because those courts that recognize these rights allow the unwary to dispose of them, choreographers would be ill-advised to depend on the courts for recognition and protection of their artistic rights.

The custom of the American dance community does, however, provide choreographers with a realistic, effective mechanism for the enforcement of their artistic rights. The customary rules regarding choreographic rights and the sanctions that enforce these rules have operated smoothly for a long time. These rules have traditionally recognized and enforced the artistic rights of the choreographer. Furthermore, these rules continue to recognize the artist's rights to preserve the integrity of his work, long after he has conveyed away the economic rights to that work. The time-honored custom of the dance community is therefore an effective, yet sensitive means of preserving choreographic rights.

Prior to the enactment of the 1976 revision, American choreographers were forced to develop rules for self-governance. They

142. *Id.*

143. *See, e.g., Gilliam*, 538 F.2d at 14.

succeeded in creating a set of customary rules tailor-made for their own special needs. Then, in 1976, lawyers and legislators offered choreographers the opportunity to partake of statutory rules ostensibly designed to encourage creative endeavors. Instead of pursuing statutory protection, however, American choreographers have continued to rely upon their own customary rules. These artists have eschewed statutory protection because they believe that the delicate balance that they have struck for themselves is at present superior to any mechanism offered to them by statute. American choreographers have their own "law", and they, at least for now, choose to be governed by it.

The fact that choreographers have made a conscious choice in favor of their system reinforces the authority of this custom. For custom always draws its strength from the consent of those agreeing to be bound by it. Thus, for as long as American choreographers believe in and abide by their self-imposed customary rules, the custom of the dance community will indeed continue to offer the best means of recognizing and protecting the artistic rights of American choreographers.