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Let's Dance! – but who owns it?*

Introduction

Commercialise to survive: this is one strong message being given by the Arts Council to the creative sector. In a time of tightening purse strings, so alternative modes of financial survival have to be developed which do not depend wholly on public funding. One of these may be through greater commercial exploitation of creative outputs. Dance is no exception to this policy focus. Commercial exploitation of dance would depend on the exclusive rights granted under the copyright framework. Fundamental to developing an exploitation strategy would be to identify the author and owner of the copyright in the dance. This is an area that has been underexplored in law: there is little case law or literature on dance and copyright, but there are certain assumptions within the dance community as to authorship and ownership. This paper will explore authorship and ownership of the dance using two case studies: one called Love Games choreographed by Joan Clevillé and which, in a recasting, featured the dancer, Caroline Bowditch; and one called The Two Fridas choreographed by Caroline Bowditch and which features the dancers Welly O'Brien and Kimberley Harvey. In choosing these case studies we also aim to contribute to the wider discussion about the legacy of the Unlimited Cultural Olympiad programme (Unlimited). The paper will suggest that, contrary to the views of some, the dancers are either authors of the copyright in the arrangement of the dance on their bodies, or joint authors in the work of dance. It will also suggest that through a greater audience understanding of the nature and the quality of the work, and through an appreciation of what it means to own dance, so commercial exploitation could be facilitated.

Current policy and legal framework

In its 2011 – 2015 plan[1] the Arts Council has set itself a number of goals. One is to ensure that *'The Arts are resilient and innovative'.* [2] A way to achieve that is through *'strengthening business models in*

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the arts, helping arts organisations to diversify their income streams including private giving'.[3] Even stronger messages are articulated in the Arts Council Creative Case for Diversity. This is situated as '*a re-imagining of the Arts Council's approach to diversity and equality, setting out how these areas can and should enrich the arts for artists, audiences and our wider society*.'[4] Participants are strongly urged to diversify their strategies in a number of ways including in their approach to creativity, to their workforce, and in responding to audiences and markets.

Dance is no exception to these ambitions. In two reports in 2009 and 2010 the dance sector in the UK was mapped and a number of proposals made about the relationship between this sector and the Arts Council.[5] In the 2010 report in a series of interviews with dancers it was noted that the dance community could take better advantage of commercial opportunities that arose which could in turn be based at least in part on more coordination and knowledge sharing.[6] Specifically on the dance pages of the Arts Council site it is stated that the organisation will:

'support[ing] the development of entrepreneurial skills to ensure that companies, artists and producers have a deeper sense of their markets and how to position themselves'[7]

The strong thread that binds these messages is the need for a greater commercial awareness and the need to respond to the market. All of this plays out against a background of cuts in public funding for the arts. In 2010-2011 public grant in aid funding to the Arts Council stood at £450 million.[8] In 2011-2012 it was reduced by 14% to £388 million; in 2012-2013 by 7.5% to £359 million; in 2013-2014 by 3% to £348 million and in 2014-2015 it will be reduced to £343

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[1] The Arts Council Plan 2011-2015 can be found at http://www.artscouncil.org.uk/media/uploads/pdf/Arts_Council_Plan_2011-15.pdf. The plan implements the Council's strategic vision 2011 – 2021 'Achieving Great Art for Everyone' available at http://www.artscouncil.org.uk/what-we-do/our-vision-2011-21/
[2] Arts Council Plan p 7.
[3] Ibid.
[4] See 'The Creative Case for Diversity: innovation and excellence in the arts' available at http://disabilityarts.creativecase.org.uk/
[5] 'Dance Mapping', 30 September 2009 and 'Joining up the dots: Dance agencies – thoughts on future direction', 26 May 2010. Both available from http://www.artscouncil.org.uk/what-we-do/supporting-artforms/dance/
[6] 'Joining up the dots' p 26
[7] http://www.artscouncil.org.uk/what-we-do/supporting-artforms/dance/
[8] https://www.gov.uk/government/policies/supporting-vibrant-and-sustainable-arts-and-culture

million.[9] As government funding reduces, so some other form of financial support needs to take its place whether that is through commercial exploitation, through philanthropy or some other avenue. The message is clear: do or wither.

One way in which the dance community might think of responding to these challenges is through exploitation of intellectual property rights, specifically copyright, in the dance. Historically dance has been almost entirely absent from our legal discourse concerning copyright particularly in the UK. One is hard pushed to find case law on copyright and dance. What there has been has included questions of ownership of copyright by a choreographer under the 1911 Copyright Act;[10] questions of infringement of the copyright in an Oscar Wilde story when adapted in the form of a ballet;[11] and a finding that a dramatic work must be capable of being performed to be protected by copyright.[12] Neither has there been much focus on dance in our law literature,[13] although there was some excitement recently over a dance performed by Beyoncé that seemed to draw heavily on earlier work by the choreographer de Keersmaeker.[14] Other jurisdictions have paid more attention to this art form and the place of copyright in its exploitation. In the US for instance dance was put on the legal map as a result of a court case

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[9] This is not the only source of funding for the Arts Council. The national lottery gives significant amount of money via the Arts Council to support the arts. Total funding including lottery funding in 2010-2011 was £601 million. In 2014-2015 it is expected to be £605 million.

[10] *Massine v. De Basil*, (1937), 81 Sol. Jo. 670 (Ch. D.); aff'd (1938), 82 Sol. Jo. 173 (C.A.).

[11] *Holland v. Vivian Van Damn Productions Ltd.*, [1936-45] MacG. Cop. Cas. 69 (Ch. D.).

[12] *Norowzian v. Arks Limited*, [2000] F.S.R. 363 (C.A.). Rivers, T 'Norowzian Revisited' [2000] EIPR 389. Arnold, R 'Joy: A Reply' [2001] IPQ 10.

[13] Most recently see Yeoh, F 'The copyright implications of Beyoncé's "borrowings,"' Choreographic Practices 2013 Volume 4 No. 1, 95; Yeoh, F, 'Choreographers' moral right of integrity,' Journal of Intellectual Property and Practice, 2013, Vol. 8, No. 1. 43-58. Yeoh, F 'Choreographer's Copyright Dilemma,' Entertainment Law Review, 2012, Issue 7, 20; Yeoh F 'The Choreographic Trust: Preserving Dance Legacies,' Dance Chronicle, 2012, 35.2, 224.

[14] http://www.youtube.com/watch?v=PDT0m514TMw Yeoh, F 'The copyright implications of Beyoncé's "borrowings,"' Choreographic Practices 2013 Volume 4 No. 1, 95-117; http://www.theguardian.com/stage/theatreblog/2011/oct/11/beyonce-de-keersmaeker-dance-move. The story continues with developments that are highly relevant for this discussion: http://www.theguardian.com/stage/2013/oct/09/beyonce-de-keersmaeker-technology-dance

concerning the ownership of dances by the choreographer, Martha Graham.[15] This spawned much literature and seemed to result in a greater appreciation of intellectual property rights in dance, at least in the US.

The dance community, unlike the music industry, has seemed hesitant about asserting rights. That is not because they do not know about copyright: our research with dancers and choreographers has shown that many do know about copyright, but it seems rarely to be of concern in their artistic endeavour.[16] What is rather more important, particularly to those who work alone or in small groups, is the process of creation of the dance and all that brings with it.[17] The work of individuals and collectives tends to be funded through a variety of means including from public funding[18] but most notably the artists often hold a portfolio of jobs to support their creative work. There is little exploitation of the dance based on copyright.[19] Given the tightening of the public purse strings and the focus on commercial exploitation as one strategy for financial survival, this may change.

The case studies and Unlimited legacy

In order to be able to exploit a work commercially, the first step is to identify the author of the copyright as from there the rules on ownership and relatedly control flow.[20] This piece will discuss authorship and ownership of a dance with specific reference to two dances both of

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[15] *Martha Graham School and Dance Foundation Inc. v Martha Graham Center of Contemporary Dance, Inc.*, 43 Fed. Appx. 408 (2nd Cir. 2002); *Martha Graham School and Dance Foundation Inc. v Martha Graham Center of Contemporary Dance, Inc.*, 374 F.Supp.2d 355, 363 (S.D.N.Y. 2005); *Martha Graham School and Dance Foundation Inc. v Martha Graham Center of Contemporary Dance, Inc.*, 466 F.3d 97 (2006); Braveman, A 'Duet of Discord: Martha Graham and her Non-Profit Ballet over Work for Hire,' Loyola of Los Angeles Entertainment Law Review, 2005, Vol. 25, 471; Connelly, S 'Authorship, Ownership and Control: Balancing the Economic and Artistic Issues Raised by the Martha Graham Copyright Case,' Fordham Intellectual Property, Media & Entertainment Law Journal, 2006,Vol. XV, 837.

[16] Waelde C and Schlesinger P, 'Music and Dance: Beyond Copyright Text?' (2011) 8:3 SCRIPTed 257 http://script-ed.org/?p=83

[17] ibid

[18] Fn 16 above.

[19] Things are different for the large concerns, such as the Scottish ballet. Here there is a very carefully worked out system of licensing of rights, most particularly for the large productions where scenery; costumes, lighting etc. are all an important part of the overall exploitation package. See generally fn 16 above

[20] Copyright Designs and Patents Act 1988 (as amended) (CDPA) ss 9-11.

which involve Caroline Bowditch, a choreographer and dance artist. The first piece is called Love Games, the choreographer was Joan Clevillé and it was first performed in Scotland in 2011 by Scottish Dance Theatre. Caroline presented her recasting in 2012 at the Pathways to the Profession Symposium in Dundee. The second piece, which at the time of writing is in the course of being developed, is about Frida Kahlo who was considered to be one of Mexico's greatest artists. Frida, who was born in 1907, started painting after she was severely injured in a bus accident. She died in 1954.[21] The authors have been liaising with Caroline for an AHRC funded project 'InVisible Difference: Dance, Disability and Law'[22] and so have had the privilege of working with her during the time that The Two Frida's has been choreographed and have thus been able to study her working methods and the processes involved in creating a dance. Focusing on Caroline and her work as a dancer and choreographer provides perfect case studies of how dance is made and performed.

But there are other themes that we want to highlight in this investigation that makes our work with Caroline so timely and relates to a debate that we think we can make important contributions to. It concerns the current discussion around the legacy of Unlimited.[23] The decades prior to Unlimited witnessed great advances in conceptualising frameworks of disability which, over time, laid the foundations for a range of policy making initiatives in the cultural sector, most recently to improve access to works by the visually impaired.[24] Ideas have moved from disability being seen as a medical problem,[25] to viewing it as society's problem,[26] to more

[21] Information about Frida Kahlo can be found on the Frida Kahlo Foundation website. http://www.frida-kahlo-foundation.org/

[22] AHRC grant number AH/J006491/1

[23] https://www.gov.uk/government/policies/creating-a-lasting-legacy-from-the-2012-olympic-and-paralympic-games/supporting-pages/paralympic-legacy Caroline Bowditch received funding for a dance piece 'Leaving Limbo Landing'.

[24] A Brown, S Harmon, C Waelde, 'Do you See What I See? Disability, Technology, Law and the Experience of Culture' 2012, 43(8) IIC 901; Brown, A and Waelde C 'Human Rights, disabilities and copyright' in Geiger C (ed) *Human Rights and Intellectual Property: from concepts to practice* forthcoming Edward Elgar 2014; Brown A and Waelde C, 'IP, Disability, Dance and Exceptionalism: Does copyright law see difference?' in Dinwoodie G (ed) proceedings of ATRIP symposium 2013 forthcoming 2014.

[25] D Turner *Disability in Eighteenth-Century England. Imagining Physical Impairment* (Routledge, Oxford, 2012).

current thinking as one of 'accept me as I am'.[27] With this greater appreciation of disability and the high profile success of Unlimited it seemed that public attitudes to disability had changed.[28] However, it is now thought that view may have been overly optimistic. The report 'One Year On: A Review of the Cultural Legacy of the Paralympics'[29] suggests that there remain polarised perceptions of disability, that people with disabilities are largely absent from leadership roles, and that only the top 1% of artists with disabilities benefitted from Unlimited. These factors combine to mean that little progress has been made on the ground.

One point that has struck us forcefully during our work on this research is the difference that can be made to the enjoyment of a work, in our case dance, when the work is understood by the audience. That is an understanding not only of the intention behind the work, such as exploring whether a disabled dancer could stand in for an able bodied dancer as in the recasting of Love Games, or the story on which the work is based, such as the life of Frida Kahlo, but also, and importantly, understanding the artistic skill that goes in to the creation and interpretation of the work. Not only does this increase appreciation of the work, but it also develops the ability of the audience to distinguish between and to judge what is qualitatively 'good' dance, and what is merely mediocre. Critically it thus allows the viewer to go beyond a response of 'Ain't they Marvelous',[30] or a wholly negative response,[31] or no response at all,[32] or a response of 'why

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[26] C Barnes and G Mercer (eds) *The Social Model of Disability: Europe and the Majority World* (The Disability Press, Leeds, 2005) 69; C Barnes and G Mercer (eds) *Implementing the social model of disability: theory and research* (The Disability Press, Leeds, 2004) C Barnes and M Oliver `Disability Rights: Rhetoric and Reality in the UK', Disability and Society, (1995) 10(1) pp. 111-116; J Swain and S French (eds) *Disability on Equal Terms* (Sage: London 2008); C Barnes, 'Disability Activism and the Price of Success: A British Experience' Intersticios: Revista Sociológica de Pensamiento Crítico 007 1(2) 1; Shakespeare, T, *Disability Rights and Wrongs* (Routledge: Oxford 2006);
[27] J Swain and S French 'Towards an Affirmation Model' Disability and Society 2000 15(4), 2000, pp. 569–582; J Swain and S French 'Affirming identity' in J Swain and S French (eds) *Disability on Equal Terms* (Sage: London 2008) p 75. C Cameron 'Disability Arts from the social model to the affirmative model' Parallel Lines (2011) available at http://www.parallellinesjournal.com/article-from-social-model.html#f16
[28] http://www.bbc.co.uk/news/uk-20686035
[29] Wood, C 'One Year On: A Review of the Cultural Legacy of the Paralympics', September 2013. Demos.co.uk. http://www.scope.org.uk/news/paralympics-legacy-0.
[30] In discussion with Caroline Bowditch. This is what she – tongue in cheek – said she would call her company if she formed one. It is her response to an audience reaction which uncritically considers all dance efforts by people with disabilities to be marvelous in the sense of overcoming disability rather than being a reflection on the quality of the dance.

bother, what is the point?',[33] to a position where it is possible to learn how to critique and appreciate the dance as a serious art form.[34] Allied to this are questions over what 'ownership' of dance means. From a copyright perspective the answer seems at first glance straightforward: subject to agreement to the contrary, the owner is the person who has authored the work.[35] The complexities masked by this seemingly simple proposition will be explored below. But there are other, different meanings that permeate the deceptively simple question and which are articulated by and within the dance community. These focus on the collaborative nature of the process of dance-making in which the dancers instantiate the ideas of the choreographer, but where ownership shifts as the dancers imprint their interpretation and individual artistry on the work, and shifts again as the work is performed in a public shared environment before an audience. Yet other meanings focus not on who owns *the* dance, but who owns *dance*? This question addresses the perception that dance is made and performed by the able-bodied, slim, trained professional individual and it is only this group that can produce dance as a serious artform:

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[31] A review by Michael Scott appeared in Vancouver Sun, May 20, 1999. Scott commented with a specific reference to Candoco company member David Toole; *"There is a horrific, Satyricon quality to CandoCo that heaves up in the chest – nausea at the moral rudderlessness of a world where we would pay money to watch a man whose body terminates at his ribcage, moving about the stage on his hands."*

[32] David Toole featured in the opening ceremony of the Paralympics. Accompanying a YouTube video of part of the event in which Birdy (Jasmine van den Bogaerde) sang Bird Gerhl the overwhelming number of comments by the public are about the song and Birdy, despite the camera being focused on Toole. http://www.youtube.com/watch?v=vhZVKYV8kGw

[33] This tends to be on the basis that dance made and performed by dancers with disabilities would not find a market.

[34] There is an interesting project at 'Dance Enthusiast', a portal for NYC dance, which encourages the public to contribute reviews of dances they have watched. The initiative stems from an article written by Christine Jowers, 'words, words, words...show me some words (October 26, 2011) in which she says: *'Words will never touch what it means to create dance. Words will never capture the dreams, the sweat, the politics, the years of study, the rage, or the poetry. No one person will ever be sensitive enough to capture every nuance of meaning in a gesture, nor will writers always be able to put what they see in a context that can illuminate a dance work's importance in the history of the art or, for that matter, in the history of life, the universe and everything. ... shouldn't we dance types and dance enthusiastic types (audience members, board members, dance fans, I am talking to you) ... learn to use them a bit more in support of the art form we love? Isn't there more hope for the dance of the future if people who love the art form passionately and have curiosity about it communicate that? Shouldn't more of us speak up or write out loud? Why save all the great opinions and insights for friends at the bar after the show? Why not commit these insights formally somewhere?'*
http://www.dance-enthusiast.com/get-involved/reviews

[35] CDPA s 11.

anything that deviates from that norm is not 'dance',[36] or at best is regarded as a therapeutic form of dance.

These are questions that are important when thinking about authorship of a dance from the perspective of copyright. In addition, an enhanced appreciation of the art form could both make a strong contribution to the legacy of the Unlimited programme, and in turn can help to make dance more commercially exploitable.

The case studies

Love Games

Against that background, we would like to invite the reader to watch Caroline Bowditch's recasting of Love Games which can be seen at http://www.youtube.com/watch?v=6YEtEyr6N4g This is an extract only from the full work. You will see two clips running side by side. On the left is a clip from the original Love Games choreographed by Joan Clevillé and performed by Naomi Murray and her partner in 2011. On the right is a clip from Caroline's recasting experiment performed in 2012. The male dancer is the same in the two clips.

Now read this description of the dance:

'In the film, the two 'versions' of the duet run on screen side-by-side. The 'original' version features Naomi Murray and her male partner Jori Kerremans. In the second version, Bowditch is cast in the female role with the (same) male partner.

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[36] This can be seen in comments made by critics. Consider this: '*Toole's abilities as a dancer are remarkable and are often the subject of extended discussions within reviews and preview articles about Candoco. Adjectives such as "amazing," "incredible," "stupefying," are liberally sprinkled throughout descriptions of his dancing. For instance, in an article in Ballet International which reviews the performances of several British dance companies during the spring 1993 season, Toole's dancing is the central focus of the short section on Candoco: "David Toole is a man with no legs who possesses more grace and presence than most dancers can even dream of. . . . Toole commands the stage with an athleticism that borders on the miraculous." This language of astonishment reflects both an evangelistic awakening (yes, a disabled man can swagger!) and traces of freak show voyeurism (see the amazing feats of the man with no legs!).*' C de Marigny, 'A Little World of Its Own,' Ballet International, June 1993, 29.

The duet in Love Games explores the dynamics of a male/female relationship that is playful and affectionate. In the Murray version, moments of gentle touching, embracing, and lyrical lifts and swoops are interspersed with more dynamic confrontations. The dancing is marked by an easy fluidity, a spirited youthfulness and athleticism as the dancers move through a sequence of intricate entanglements. Murray conforms to the image of the 'dancer's body'; she is long-limbed, long-haired and graceful, with a femininity that is highlighted by the male partner, who is the stronger of the two, and who supports her and lifts her with ease. It generally upholds many of the conventions of a typically hetero-normative duet. The recasting of Bowditch imposes a new frame, which blurs traditional gender roles. The female 'dancerly body' is refracted through the very different physicality of Bowditch, who dances in her wheelchair. In many ways the recasting is a clear example of how to 'translate' a role from one dancer to another but in so doing it exposes much more about the politics of translation and adaptation within mainstream theatre dance. The opening moment sees each woman lifted into an embrace by the man. What is striking is that Bowditch is just over three feet tall, so she resembles a child when held by her partner. But this image quickly dissolves as the duet continues and her confident physicality as a wheelchair dancer resists any reading of youth or innocence.

The emphasis on verticality and linearity in the first duet gives way; the man moves more into and from the floor to negotiate new ways to partner Bowditch in her wheelchair, who refuses to be his muse. Bowditch's wheelchair opens up a different kind of dialogue on the stage space. So often a powerful signifier of disability/immobility, her wheelchair is now enabling, signifying mobility, independence and the power to support. Bowditch manoeuvres her chair with a technical virtuosity equal to the technical feats of the non-disabled dancers, integrating the chair into her dancing in a way that chimes with Albright's description of Charlene Curtiss's dancing:

> [Curtiss] claims the chair as an extension to her own body [and] revises the cultural significance of the chair, expanding its legibility as a signal of the handicapped into a sign of embodiment.[37]

Bowditch's chair acts as her partner, supporter and transporter, and her control of it diminishes

[37] Albright, Ann Cooper *Choreographing Difference; The Body and Identity in Contemporary Dance*, Hanover: Wesleyan University Press 1997 p 83.

the role of her male partner, but also means that the male role is made more equal to her own. Although Bowditch's recasting may not be aimed at gender re-balance, their roles are exchanged as the duo engage in quirky, fluid and playful 'love games'. Murray's version concludes with the rest of the ensemble entering and interrupting the duo on stage and she moves away from her partner; Bowditch's ends with the duo alone on the stage. She turns first towards and then away from the audience and moves in a lilting pathway upstage as the man stands away, leaving the space to Bowditch. It has a wistful quality, but she seems neither forlorn nor abandoned.

The two very different bodies viewed together in the film make each other more interesting. Variation in tone and amplitude is made more vivid; softly pedalling feet and subtle gestures and handholds are more visibly delicate and texturally layered in each of the paired films. In short, it reinforces the differences between the women's roles whilst retaining the integrity of the choreographic intention. The film – with its two versions running simultaneously – also recalls, however fleetingly, those works where there is a conscious play on the opposing states of vulnerability and strength, such as Trisha Brown's solitary quest in If You Couldn't See Me (1994), or Jerome Bel's questioning of the nature of dance in Veronique Doisneau (2004). In this regard, we might ask: Is the story that Bowditch and her partner are telling the same story that Murray and her partner are telling? In other words, is it the same story differently expressed, or is it now a different story with different messages? And by drawing attention to her own subjectivity, Bowditch invites more attention to the individual subjectivities and agency of the other dancers too. In her willingness and desire to be cast in the role, Bowditch seems able to express what she sees, feels and experiences as a dancer previously excluded from roles in mainstream dance such as Love Games.'

Perhaps it might be worth revisiting the YouTube clip in the light of this narrative.

The Two Fridas

The second piece is a work called For the Love of Frida and is being developed by Caroline as choreographer during 2013. Part of this work involves an interpretation of 'The Two Fridas' which was painted by Frida after her divorce from Diego Rivera. The work is said to show her

deep hurt at the divorce. A copy can be seen on the Frida Kahlo Foundation website.[38] The photograph below shows Caroline working with two of the dancers, Welly O'Brien and Kimberley Harvey, in constructing an interpretation of the picture. The process of creating the dance was iterative. There was discussion around how Frida might feel at this point in her life; the dancers develop movement in response, both reacting to Caroline's ideas and leading in the movement. Caroline tasked the dancers with choosing five words from two lists developed in a workshop the previous week and from Facebook contacts. One was headed 'unloved' and the other 'loved'. The dancers were to work on movement that illuminated what the words mean. Caroline instructed the dancers to let her know if they wanted her to come in and said 'let's see where it goes'. This iterative process continued for over an hour. Eventually Caroline captured the dance on a recording device.

Welly O'Brien and Kimberley Harvey developing dance moves

Caroline discussing the development of the dance

[38] http://www.frida-kahlo-foundation.org/the-complete-works.html

Caroline capturing the dance on a recording device.

So who has authored, and who owns the dance?

So who has authored, and who owns the dance? From a legal perspective key to this question is identifying w*ho* has expressed the correct authorial input into the work. Here it is important to emphasise that it is the *work* in which copyright resides once fixed that is under investigation, and not the performance of the work.[39] However, that the line between the two is not easy to identify has been beautifully encapsulated by Yeats in lines from his poem, Among School Children:[40]

> *O body swayed to music, O brightening glance*
>
> *How can we know the dancer from the dance?*

So we are concerned with is 'what is the work', and who makes the right sort of authorial contribution to that work. There seems a clear assumption in the dance community that the choreographer is the author of the dance and the owner of the copyright in it. This comes across in interviews with choreographers,[41] and in the literature both by[42] and about choreographers.[43] The one British case to have considered the question, *Massine v de Basil*,[44] was

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[39] The performance would be protected by performers' rights. CDPA Part II.

[40] William B Yeats, *Among School Children*. 1927

[41] 'Music and Dance: Beyond Copyright Text?' fn 16 above.
[42] A De Mille, *And Promenade Home*, (Boston, Toronto: Little, Brown and Company, 1956), at 256. *"[T]he choreographer is glued immobile as a fly in a web and must watch his own pupils and assistants, suborned to steal his ideas and livelihood. Several dancers made paying careers out of doing just this*".
[43] See generally McFee, G *The Philosophical Aesthetics of Dance: Identity, Performance and Understanding.* Alton: Dance Books 2011.

decided under the 1911 Act which in turn included a reference to 'choreographic work'[45] as did the 1956 Act.[46] The Copyright Designs and Patents Act 1988 (CDPA) however says nothing about choreography or choreographic work but does provide that a dramatic work includes a work of dance[47] and the author is the person who creates that work.[48] UK case law on identification of a dramatic work is sparse. It seems that a dramatic work can't be purely static and should have movement, story or action[49] and should be capable of being performed[50] but we know little beyond that. If we look at the case study examples above, is Love Games a work of dance and if so, is Joan Clevillé as choreographer the owner of the copyright? Is Caroline the owner as a dancer? Or is it both? Assuming that The Two Fridas is a work of dance, is it Caroline as choreographer who is the owner in the copyright? Is it Welly O'Brien and Kimberley Harvey as dancers? Or are they all authors in law?

What is the dance?

While as noted above the UK case law on identifying a dramatic work or work of dance for the purposes of copyright is sparse, the position is currently complicated by the development of jurisprudence from the Court of Justice (CoJ) around both the categorisation of works and in relation to the level of originality needed for the subsistence of copyright. Under the CDPA a work has to fall into a particular category in order to be protected by copyright: for our purposes, a dance must fall into the category of dramatic work.[51] In terms of the level of originality required, this has historically been very low in the UK, requiring only 'skill labour and effort' and that a work should not be copied.[52] This in turn has meant that few works have been

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[44] [1936–45] MacG CC 223

[45] Copyright Act 1911 s 35(1) ' Dramatic work ' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character

[46] Copyright Act 1956 s 45(1). Carrière L 'Choreography and Copyright: some comments on choreographic works as newly defined in the Canadian Copyright Act' 2003 available at http://www.robic.ca/admin/pdf/279/105-LC.pdf

[47] CDPA s 3

[48] CDPA s 9(1)

[49] *Creation Records v News Group* [1997] EMLR 444.

[50] *Norowzian v. Arks Limited*, [2000] F.S.R. 363 (C.A.).

[51] CDPA s 3(1).

[52] *University of London Press v University Tutorial Press* [1916] 2 Ch 601.

denied protection. The CoJ case law seems to challenge these criteria in a way that appears to conflate the concept of the work and the requirement of originality.[53] The CoJ has stressed that the European scheme of protection for copyright protects works where the subject matter is original in the sense of being the author's intellectual creation.[54] What the work is called, in other words for our purposes whether it is a work of dance being a subset of the category of dramatic works, is irrelevant, although it seems that a work would need to fall under the Berne Convention categories of a literary or artistic work.[55] The standard of originality for all types of work is the same: it is one of intellectual creation.[56] To reach this level the author should express her creative ability in an original manner by making free and creative choices,[57] and stamp her 'personal touch' on the work.[58] Where choices are dictated by technical considerations, rules or constraints which leave no room for creative freedom, then these criteria are not met.[59]

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[53] van Eechoud, M, 'Along the road to uniformity – diverse readings of the Court of Justice Judgments on copyright work' 3 (2012) JIPITEC 1 para 60; Handig, C 'The "sweat of the brow" is not enough! – more than a blueprint of the European copyright term 'work", 2013, EIPR 1; Rahmatian, A, 'Originality in UK copyright law: the old "skill and labour" doctrine under pressure', 2013 IIC 3; Rosati, E, 'Towards an EU-wide copyright? (Judicial) pride and (legislative) prejudice', 2013 IPQ 46; J Pila, 'An intentional View of the Copyright Work' (2008) *Modern Law Review* 71; C Handig, "*Infopaq International A/S v Danske Dagblades Forening* (C-5/08): is the term "work" in the CDPA 1988 in line with the European Directives?" (2010) *EIPR* 32(2), 53

[54] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* (*Infopaq*) paras 33 38. See also Case C -393/09 *Bezpečnostní softwarová asociac*e para 45 What is not protected is expression which is limited by its technical function. Case C- 406/10 *SAS Institute Inc. v World Programming Ltd* paras 38-40. Case C-145/10, *Painer v Standard VerlagsGmbH et a*l In the UK see *SAS Institute Inc.v World Programming Ltd* [2013] EWHC 69 (Ch) para 27.

[55] Berne Convention Article 2(1). *SAS Institute Inc v World Programming Limited* [2013] EWHC 69 (Ch) para 27.

[56] *Case C-5/08 Infopaq International A/S v Danske Dagblades Forening, ,* Case C‑393/09 *Bezpečnostní softwarová asociace paragraph 45*; Joined Cases C‑403/08 and C‑429/08 *Football Association Premier League and Others;* Rosati, E, 'Originality in a work, or a work of originality: the effects of the *Infopaq* decision' E.I.P.R. 2011, 33(12), 746. Derclaye, E*,* 'Wonderful or Worrisome? The Impact of the ECJ Ruling in Infopaq on UK Copyright Law' (2010) EIPR 32(5), 248.

[57] *Infopaq*, para 45; *Bezpečnostní softwarová asociace*, para 50; *Painer*, para 89, *Football Dataco* para 38

[58] *Painer*, para 92; *Football Dataco* para 38.

[59] *Bezpečnostní softwarová asociace*, paras 48 and 49, F*ootball Association Premier League and Others,* para 98; *Football Dataco* para 39. See also the articles at fn 53.

When trying to describe a dance, dictionary definitions do no justice to the artform. For instance the Oxford Dictionaries refers to: *'move rhythmically to music, typically following a set sequence of steps'.* While there are debates among dance professionals as to what constitutes a dance, many of these focus on a personal view of the quality of the work. Those in the dance community are not always in agreement. Nijinsky said of work by Duncan *'...her performance is spontaneous and is not based on any school of dancing and so cannot be taught... It is not art'.*[60] Others talk of the difficulty in identifying the work in postmodern dance: *'One major aspect of postmodernism in dance is the nature of the works created: its structure and form challenge the traditional and consequently it is difficult to fix its identity as the works are prone to have many identities: each instantiation is a 'token' of the work.'*[61]

While the definitions maybe inadequate, the commentators divided and the case law sparse on what constitutes a dance, in the light of the descriptions above and reproductions on YouTube and on Caroline's recording device, we would have no hesitation in saying that Love Games and The Two Fridas are both works of dance (where the word 'work' is used advisedly in the light of the CoJ case law).

What is the authorial input?

The much more difficult questions lie at the interface between the authorial input necessary to be considered an author for the purposes of copyright, and the input that instead interprets a work and is thus in the nature of performance. There is no case law on dance, and only limited case law considering the authorial requirements in respect of dramatic works. *Brighton v Jones*[62] considered whether a director and playwright were the joint authors of a play. One argument was made in respect of the contributions made during the course of rehearsals. The court noted that one contributor, Miss Jones, the defendant, had contributed the plot of the play in advance of rehearsals. In addition, and while Miss Brighton, the claimant, had contributed ideas to the

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[60] Jowitt, D *Time and the Dancing Image* (University of California Press: Berkeley and Los Angeles) 1988, p 76

[61] Yeoh, F *Copyright Law does not adequately accommodate the art form of dance'* PhD thesis Birkbeck College 2012. See also see S Rubidge 'Identity and the Open Work' in '*Preservation Politics; Dance Revived, Reconstructed, Remade*' ed. S Jordan (Dance Books: London 2000) p 205. Note also the difficulty that there is in postmodern art of finding a category: Lori Petruzzelli, 'Copyright Problems in Postmodern Art', 5 DePaul J. Art and Ent. Law 115 1994-1995

[62] [2004] EWHC 1157 (Ch).

dialogue, the decision on whether these were taken up were for Miss Jones. These, the court found to be '*contributions to the interpretation and theatrical presentation of the dramatic work*'[63] rather than to contributions to the work itself.[64] In *Coffey v Warner* [65]concerning a musical work, voice expression, pitch contour and syncopation were found to be elements in the *'interpretation or performance characteristics by the performer'* which was not *'the legitimate subject of copyright protection in the case of a musical work, rather than to composition, which is.*'[66] A number of observations can be made. *Brighton v Jones* was not concerned with the input into the work by the performers, but rather by those in charge of realising the performance. Further, it is quite accepted that where a performer interprets the work of another, such as where dancers interpret the choreographers instructions in performing a ballet, and where there is no scope for the dancer to make creative choices, nor is there room for a dancer to stamp her personal touch on the work, then the dancers' input would not result in copyright, and performers' rights are the appropriate mechanism to protect her interests. But there is a real difference between that type of performance and a performance in which the performer brings her own input to the creation of the work. The more that the creation of the dance is an iterative, collaborative process, the more such input must be recognised as being of the right sort to be considered authorial whoever has made that input.

Certainly *Coffey v Warner* seems to rule out certain elements of musical performance as suitable for copyright protection, but finding analogies within dance seems problematic. Might a battement développé be considered equivalent to voice expression? Or is a relevé equivalent to syncopation? While it is fully accepted that dance moves as such could not, and should not be the subject of protection by copyright, but it is rather how they are combined in the dance that is important and relevant,[67] it seems difficult to equate these as they feed into the creation of the work. Further, in *Coffey* the elements were found to be not '*the legitimate subject of copyright protection in the case of a musical work*'. With the new case law from the CoJ mentioned above, it seems that

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[63] Ibid para 56
[64] Citing *Fylde Microsystems Ltd v Key Radio Systems Ltd* [1998] FSR 449
[65] *Coffey v Warner/Chappell Music Ltd* [2005] EWHC 449. See also *Tate v Thomas* [1921] 1 Ch. 503 where the individual who supplied ideas and some lines of a play 'Lads of the Village' was not an author of the copyright.
[66] *Coffey v Warner* para 6.
[67] By analogy with *Re the Joey Racino Show* Case 4 OB 216/07D Austrian Supreme Court [2009] ECC 26. The work must 'go beyond the craft of dance handed down from teachers or even determined by new styles, or beyond the use of common gestures and mimes...' para 20.

the concept of 'work' as we have understood it in the law of copyright may not be relevant. If so, then this may leave space for hitherto unprotected elements, or combinations of elements, to be considered as suitable for protection by copyright. There could perhaps be challenges for some dances in relation to the 'dictated by technical considerations' proviso. Some works which have historically been protected may no longer receive copyright status because they are limited by their technical function. An example from music is the skill, labour and effort exerted in updating musical scores to recreate the music of a baroque composer: the input may be considered to be dictated by technical requirements and therefore may not capable of protection by copyright.[68] By analogy, would the recreation of an historic dance to conform to an original production now earn its own copyright protection? – arguably not if its re-creation was dictated by the technical requirements of the original choreographer. How much, however, of the dance should be considered personal to the dancer as opposed to fixed on the body by the choreographer or an interpretation of the choreographers' intent, will be considered below. At this point it should be noted that while the copyright framework is built around the author, the focus of the law to determine the subsistence of copyright is on the work and the authorial input, and not on the personal attributes of the author.

What is Fixation?

One final requirement for the subsistence of copyright in the dance needs to be considered before we move to considering Caroline's relationship to copyright as choreographer and dancer in the two pieces under consideration, and that is the requirement of fixation of the work.

Although there is no requirement of fixation in the international framework for copyright to subsist,[69] the law in the UK does require that the work be fixed in some material form:[70] copyright only arises on fixation. What form fixation takes is left open and needs only to be 'in writing or otherwise'.[71] Traditionally fixation has been thought of as being in writing, reflecting the historical text-based roots of copyright law. For dance, one of the notation systems such as

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[68] *Sawkins v Hyperion Records Ltd,* [2005] EWCA 565.

[69] Berne Convention Article 2.2 leaves fixation to members of the Union

[70] This is so the extent of the monopoly claimed may be known to others. *Tate v Fulbrook* 1908 1 KB 821 at 832.

[71] CDPA s 3(2).

Laban or Benesh might be deployed, both of which have relatively modern origins, having been invented in the mid 20th century. More modern examples of dance fixation, and those relevant to Love Games and to The Two Fridas might include film and video, computer animation, motion capture and holography.[72]

But for dance, meeting the requirement of fixation is perhaps too easily assumed. These methods might fix the work but may not capture the essence of the dance. Choreographers voice different opinions as to what amounts to fixation as well as challenging the requirement itself. As to the dance, some view its fugitive nature as presenting particular problems for capture; others point to the technicalities of the art form occupying both space and time as being too challenging for fixation.[73] Yet others assert that the dance is fixed or 'set' in the 'memories and bodies of the dancers' where the bodies are considered material objects.[74] For others the idea of any form of record is an anathema: the dance is meant only to be ephemeral – to exist at the time of performance where fixation ossifies the work.[75] But this raises challenges in law for dance: the paradox is that fixation is the key to copyright protection for works of dance, but at the same time presents a high hurdle. To gain the protection of copyright what has to be captured is *a* version of the work, whatever the participants and the community might think about the quality of the work and its ossification, or however challenging notation systems might be for a true representation of a dance. If there is no fixation, there is no protection at all.

The question arises whether, in law, the body could be a part of a work protected by copyright, or, relatedly, could the body be seen as a human canvass?[76] On this latter point, the current state of the law in the UK would suggest not. A court refused to accept that Adam Ant's make-up

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[72] Each of which may have separate protection in their own right.
[73] Cook, M 'Moving to a new beat: copyright protection for choreographic works' 1977 24 UCLA L Rev 1287.
[74] Traylor, M. 1981. 'Choreography, Pantomime and the Copyright Revision Act of 1976.' New England Law Review 16: 227, 237
[75] See for instance Théberge, P 'Technology Creative Practice and Copyright', in S Frith and L Marshall (eds) *Music and Copyright* (Edinburgh: Edinburgh University Press 2004 2nd ed) 139, 140.
[76] The phrase human canvas has been coined by David Cummings in David. M. Cummings, 'Creative Expression and the human canvas: An examination of tattoos as a copyrightable art form', 2013 U. Ill. L. Rev. 279 2013.

was the subject of copyright protection because it was painted on his face and not fixed to a surface saying that a painting is an object and not an idea.[77] The court wanted to separate the idea in the work from the expression of the idea as copyright protects only expression and not ideas.[78] On whether the body could be part of a work protected by copyright, this is the heart of the question for performative works. It seems that for this genre, the idea and expression may fuse into one – as in the fixation of the dance on the bodies of the dancers.[79]

Caroline and Copyright

So what of the recasting of Love Games and of The Two Fridas? Where does Caroline stand in relationship to the authorship and ownership of these dances? The requirement of fixation is clearly met. Whatever may be thought of the fixation requirement, the parts of Love Games that are available on YouTube, and The Two Fridas captured on Caroline's recording device have been fixed in a form that is sufficient to meet this prerequisite.

When thinking about the different relationships in the creation of the dance, a useful analogy might be to look at the subsistence of copyright in music. A distinction exists here between

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[77] *Merchandising v Harpbond* (1983) FSR 32.

[78] *Designers Guild Ltd v Russell Williams (Textiles) L*td [2001] FSR 11, paras 24, 25

[79]The fusion of idea and expression by the fixation of the work has echoes in the development of postmodern and body arts. A question recently gaining attention is whether or not copyright can protect works which rely on the human body for their expression. The debate has been caused by the suit brought by a tattoo artist against the production company Warner Bros for reproducing the work he realised on Mike Tyson in the film The Hangover II. The case was settled between the parties. See Complaint 1 1, Whitmill v. Warner Bros. Entm't. Inc., No. 4:11-cv-752, (E.D. Mo. April 28, 2011), 2011 WL 2038147. Beasley, M 'Who owns your skin: Intellectual Property Law and norms among tattoo artists', 85 S. Cal. L. Rev. 1137 2011-2012; Cummings, D 'Creative Expression and the human canvas: An examination of tattoos as a copyrightable art form', 2013 U. Ill. L. Rev. 279 2013 ; Hatic, M 'Who owns your body art? The copyright and constitutional implications of tattoos', 23 Fordham Intell. Prop. Media & Ent. L.J. 396 ; Lesicko, C 'Tattoos as visual art: How the body fits into the Visual Artists Rights Act' 53 IDEA 39, 2013; Harkins, C 'Tattoos and copyright infringement: celebrities marketers, and businesses beware of the ink', 10 Lewis & Clark L. Rev. 313 2006.; ; Cotter, T and Mirabole, A 'Written on the Body: Intellectual Property Rights in Tattoos, Makeup and other Body Art', 10 UCLA Ent. L. Rev. 97 2002-2003. The 'body of difference' however seems far from a neutral canvas.

composition and arrangement. Copyright can subsist in an original musical composition[80] and a separate copyright can exist in an arrangement of the composition so long as the correct type of originality has been expended.[81] This reflects the reality of what happens in the music industry when musicians come together as a group to play and develop an original composition. Could similar 'layers' of copyright be useful in conceptualising authorship of a dance? If the choreographer is to be the owner of the copyright in the dance, why can the dancer not be considered as an arranger of the choreography?[82] The dance may be 'placed on the body' by the choreographer, but is there not room in interpretation and arrangement on and through the body for authorial intent sufficient for copyright? This is particularly so if we look at Caroline's virtuoso arrangement of the dance, interpreting Joan Clevillé's choreographic intent, but producing a dance visibly different from that performed by Naomi. It seems unarguable that Caroline's personal touch is stamped on her recasting of Love Games. It is only Caroline who knows how her body operates. It is only Caroline who could produce the dance in the form that she has. Copyright is of course blind to difference in the sense that, as noted above, in determining the author of a dance the focus is on the work and not the individual, but it is only Caroline who could create the expression of the arrangement of the dance on her body in the way that she has: and that seems quintessentially what copyright authorship is about.

In terms of who then is the author of the dance, it seems that there are two: one in the composition, Joan Clevillé, and one in the arrangement, Caroline Bowditch.[83] Some have said that this is not a plausible argument:[84] copyright focuses on the work, and not on the personal

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[80] First recognised in *Bach v Longman,* 98 ER [1777] 1274.
[81] *Austin v Columbia,* [1917-1923] MacG CC 398; *Robertson v Lewis,* [1976] RPC 169; *Redwood Music v Chappell & Co Ltd.,* [1982] RPC 109. Although the case law which has considered copyright in arrangements tends to leave the line between composition and arrangement rather fuzzy *Godfrey v Lees,* [1995] EMLR 307; *Beckingham v Hodgens,* [2002] EMLR 45; *Hadley v Kemp,* [1999] EMLR 589; *Fisher v Brooker*, [2009] UKHL 41. See also Arnold, R 'Reflections on "The Triumph of Music: Copyrights and Performers' Rights in Music' (2010) *IPQ* 153; Arnold, R 'Are Performers Authors? *Hadley v Kemp*,' (1999) *EIPR* 21(9), 464.

[82] *Redwood Music Ltd v Chappell & Co Ltd* [1982] R.P.C. 109; *Fisher v Brooker* [2009] UKHL 41
[83] If on the other hand the two contributions are considered indistinguishable, the dance could be considered a work of joint authorship. *Fisher v Brooker* [2009] UKHL 41; *Brighton v Jones* [2004] EWHC 1157 (Ch) *Stuart v Barrett [1994] EMLR 449*; *Hadley v Kemp,* [1999] EMLR 589

[84] Conversation at ATRIP Oxford 2013.

attributes of the author who makes that work; others argue that it is an interpretation of a work and thus in the nature of performance and more apt to be protected by performers' rights than by copyright. These two points bring us back to ones that were made earlier in this paper: the first is that copyright resides in the work, and that has to be distinguished from the performance although both may subsist in the one work – and that is the position here. Caroline's very particular arrangement of the dance on her body – which could not be created in the same way by anyone else - not only results in a virtuoso performance, but goes beyond interpretation to the expression of the arrangement of the dance. The second is hinted at in the description of the dance: *'is it the same story differently expressed, or is it now a different story with different messages?'* Caroline would certainly have performers' rights in her performance. But performers rights and copyright are not mutually exclusive. Caroline is a copyright author in her interpretation – or put another way, her arrangement - of Love Games.[85]

And what of The Two Fridas? Some of the process of the creation of the dance has been described above. On asking Caroline and Kimberley 'who owned the dance?' the response was interesting: for Caroline, the *ideas* were hers and for that she would be credited as choreographer but it is the dancer's *dance* and they would be credited as collaborators. Further, and as the work was a commission by East London Dance, so there are three potential owners: the commissioner, the dancers and herself as choreographer. Overall however Caroline thought that *'people want to be part of it, not own it'*. For Kimberley, Caroline owned the dance and it was her (Kimberley's) professional intent to interpret Caroline's ideas. Caroline certainly has the ideas, but such is her choreographic style that not only at times does she instruct the dancers to interpret those ideas, only asking that they say if they need input, but also, from time to time, she intervenes to direct particular moves and sequences. Now ideas are of course not protected by copyright,[86] so is Caroline's input sufficient for authorial copyright in this regard?[87] Having observed the process, we would answer undoubtedly 'yes'. While she gives the dancers space to interpret her ideas, and, in line with the points made above, only Kimberley and Welly really know how their bodies will interpret the dance, she also is actively engaged in laying the dance on the bodies of the dancers as the work develops. The creation of the dance involves active

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[85] Caroline would also have performers' rights in her performance. CDPA Part II
[86] *Designers Guild v Russell Williams* [2001] FSR 113 (HL)
[87] *Brighton v Jones* [2004] EWHC 1157 (Ch)

collaboration between the three of them. The process of creation of the dance, its interpretation and expression on the bodies of the dancers have fused in to one in which individual contributions are indistinguishable, and which, once captured, is a work of dance protected by copyright. Caroline Bowditch, Welly O'Brien and Kimberley Harvey are joint authors of the copyright in that dance.

One point to ponder that may reinforce the point, particularly for those skeptics who believe that the only authorial input worthy of copyright is made by the choreographer. Suppose Caroline, in her role as choreographer, merely relayed her ideas to Welly and Kimberley much as Miss Brighton contributed ideas to the dialogue of the play, but the decision on how to interpret all of them was taken by the dancers. Or what if Caroline was the dancer and there was no separate choreographer? Would these examples mean that there was no copyright in the dance at all if it was not to reside in the dancer(s)? Or copyright would exist in the dance, but it would have no author? This would seem the logical conclusion if the dancers are to be denied their share of the copyright in the dance.[88]

Foundations for the future

So, where a dancer interprets the choreographer's intent through making choices as to how the dance will be expressed on her body, then she is the author of the copyright in her arrangement of that dance. Where dancers collaborate in the creation of a dance through an iterative process, and during which they all make choices as to how the dance will be embodied, then they are joint authors of the resultant work. In the absence of agreement to the contrary, each author is then an owner of the copyright, and each is entitled to have a say in how that work is exploited. As such each would be entitled to share in any royalty income. Some have argued that this is unworkable because of the challenges that would be raised by having to seek consent from numerous copyright owners.[89] Two comments spring to mind. The first is that complexity in exploitation is not a reason for denying an author her (intangible) property right. Conveying

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[88] In the music industry the courts have allocated different percentages in the copyright of a musical work to different authors depending on their contribution to a work. When asked, Caroline indicated that if royalties were paid for exploitation of the dance, for example if it was featured on television, then these would be shared equally between those involved.
[89] Conversations at IFTR Barcelona July 2013.

individual flats in a block is more complex than conveying the property as a whole – but that does not justify consolidating ownership. The second is that ownership can be streamlined by way of licensing.[90] Much as the various layers of copyright in a musical work tend to be consolidated in the hands of the record company, so the layers of copyright in a dance could be consolidated in the hands of the choreographer – if it was her hands that could best exploit the work. And that brings us to another point. By thinking in depth about the authorship and ownership of the dance, so we can lay the foundations for thinking about how exploitation might be taken forwards: it is, in other words, one step along the way to developing a business model for dance.[91] It was pointed out above[92] that some have argued that this point is irrelevant because dance made by dancers with disabilities will never be commercially exploitable as it will not find an audience.[93] In response: one of our aims with this project is to educate and to inform, to raise awareness and understanding of dance made and performed by dancers with disabilities amongst diverse audiences which will, we hope, heighten appreciation of it as a serious art form. Dance is not the preserve of the able-bodied: differently abled groups and individuals are equally entitled to 'own' dance. In addition, it should be remembered that social media in particular offer many diverse ways in which exploitation can occur. No longer are we tied to, say, royalty streams from licensing recorded forms of the dance. Consider for instance

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[90] In some cases concerning ownership of music the courts seem to have been wary of finding some contributors copyright authors because of the licensing complexity that would ensue. McDonagh L, 'Rearranging the roles of the performer and the composer in the music industry: the potential significance of Fisher v Brooker', 2012 IPQ 64.

[91] Some very interesting work is being done around digital authorship in the following studies: Cooper, E 'Authorship and Copyright: Reassessing the Challenge of the 'Digital" in *The Work of Authorship* (Amsterdam, University of Amsterdam Press, forthcoming 2014), the final anthology of the HERA funded project Of Authorship and Originality. Travlou, P and Kheria S, *Creation and Publication of the Digital Manual: Authority, Authorship and Voice*, AHRC funded Digital Transformations Project, Edinburgh University. Born, G *Music, Digitization, Mediation: Towards Interdisciplinary Music Studies (MusDig),* lead by Oxford University. The suggestion is emerging that questions over authorship may stem from the objectives of a particular practice informed by its context.

[92] Fn 33 above

[93] The economic contribution of performers in general has been questioned for many years. See Adam Smith in The Wealth of the Nation 1776 where he describes performances as the epitome of unproductive labour: *"players, buffoons, musicians, opera-singers, opera-dancers" whose work "perishes in the instant of its production".* Adam Smith, *The Wealth of the Nation*, Volume 1 (1776) Hayes Barton Press, ed. The Originals (1961) p 221.

the YouTube clip of the opening ceremony of the Paralympics referred to above.[94] Imagine that each time the clip is viewed, advertisements appear; each time that advertisements appear, the advertisers make a payment to YouTube; each time a payment is made this is shared between 'owners'.[95] Why should David Toole, as an owner of the copyright in his dance, not be entitled to a share of that income? His argument would be so much more powerful from the perspective of an owner of the copyright in the dance as he would be on equal terms with equally as powerful and entitled copyright owners in the many other layers of copyright that make up the spectacle. So this may not be a form of exploitation that is currently much used, but it is potentially a lucrative one. And with the many forms of social media, the different ways in which a work might bring in revenue is limited only by the imagination.

Situating the dance within the context that it is made and critically examining the process of creation not only allows us to untangle matters of authorship, but it also cultivates a real, and important, appreciation of the dance. Before the non-dancers started on this project, we had little real idea of the nature of the process involved in the creation of the dance; little appreciation for the technical and creative skill involved in that process of creation; and little idea of the iterative processes involved. Our two case studies have forced us – willingly – to focus on dance made and performed by choreographers and dancers with disabilities. By working closely with them, we are slowly starting to understand these issues, and we are slowly starting to be able

[94] http://www.youtube.com/watch?v=vhZVKYV8kGw

[95] This is what happens with many YouTube clips.

to judge the good from the mediocre.[96] Not only are we full of admiration for the skill of our colleagues and their dedication to dance, but by raising awareness of the issues in a forum and with an audience which has hitherto paid little obvious attention to these matters, we aim to raise the profile of dance made and performed by disabled dancers and in so doing contribute to the all important legacy of the Unlimited programme.

[96] We have looked at a great number of different clips of dancers and their dances during the course of this project. These have included the following: Candoco: Unlimited Commissions 2012 http://www.youtube.com/watch?v=Utpg6A5fnWo; The Perfect Human/Still 2009 http://www.youtube.com/watch?v=nE4TJzuE5f4; Three Acts of Play 2013 http://www.youtube.com/watch?v=GRkovdKM4zA. Aerial Silk Duet from the Gimp Project 2011: http://www.youtube.com/watch?v=Zd1c96kpccw: David Toole: How to dance without legs 2009 http://www.youtube.com/watch?v=mLe9ZSwU4aQ; Extraordinary (Dis)ability 2010 http://www.youtube.com/watch?v=8DZaBd3vIIk; The Impending Storm // IDFB 2012 2012 http://www.youtube.com/watch?v=oC0txMIkGkU; The Cost of Living 2008 http://www.youtube.com/watch?v=VcpcujComks; Claire Cuningham: Dancing without Limits 2009 http://www.youtube.com/watch?v=GAoQgmQekxc; A brief encounter with Claire Cunningham. 2011 http://www.youtube.com/watch?v=_NIZIrzOXyU; AXIS on SYTYCD 2011; http://www.youtube.com/watch?v=rdLsRefSh58; Hand in Hand. Ma Li and Zhai Xiaowei 2007 http://www.youtube.com/watch?v=o_nMW3OQrr0