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THE BALANCING ACT: HOW COPYRIGHT AND CUSTOMARY PRACTICES PROTECT LARGE DANCE COMPANIES OVER PIONEERING CHOREOGRAPHERS

I. INTRODUCTION

One of the most loved choreographic works of all time is *The Nutcracker*, a fictional tale in which a child's imagination comes alive.¹ In this adventure, sugar plum fairies flit, snowflakes flutter, dolls come alive, and dancing candy canes delight the soul.² This magical tale tells another story, one of how copyright law often fails to protect some choreographic works. Although the Copyright Act was revised in 1976 to protect dance works, many choreographers, as prolific and ingenious as George Balanchine, will not receive adequate protection absent the financial backing of a large company.³

This paper discusses the inability of copyright law to protect the choreographic works of small, unknown choreographers and the dance community's continued successful reliance on historical forms of protection. Part II of this paper provides a brief history of dance and the process of creating choreographic works.⁴ Part III discusses the systems and enforcement of protection for choreographic works under copyright law and community customs.⁵ Part IV discusses choreographers' desired remedies and those remedies currently available under copyright law.⁶ Finally, Part V discusses

1. See GEORGE BALANCHINE & FRANCIS MASON, 101 STORIES OF THE GREAT BALLETS 277-83 (Doubleday & Co. 1954) (1989) (describing personal love of story). According to choreographer, George Balanchine, "[T]oday many companies perform *The Nutcracker*. It has almost become a kind of annual Christmas ritual in many American and Canadian cities." *Id.* at 277. Leo Ivanov created the first version of the work, but touring companies usually did not perform the entire ballet. *See id.* Balanchine reworked the ballet and first performed the entire work in 1954. *See id.* It has been performed in its entirety in New York City by the American Ballet Theatre every Christmas season since that time. *See id.* at 277-78. *See generally* MARGOT FONTEYNE, THE MAGIC OF DANCE (Alfred A. Knopf 1979).

2. See BALANCHINE & MASON, *supra* note 1, at 277-83 (telling story of *The Nutcracker*).

3. For a discussion of how choreographers remain unprotected, see *infra* notes 50-190 and accompanying text.

4. For a discussion of the history of dance, see *infra* notes 9-49 and accompanying text.

5. See Copyright Act, 17 U.S.C. §§ 101-810 (2000) (originally enacted as Act of Oct. 19, 1976, Publ. L. No. 94-553, 90 Stat. 2541, codified at 17 U.S.C. §§ 101-810 (1976)). For a discussion of the customs relied on by the dance community, copyright law, and state common law, see *infra* notes 50-195 and accompanying text.

6. For a discussion of the Copyright Act as applied to choreography, see *infra* notes 196-212 and accompanying text.

the plausibility of granting the same protections currently given to large companies to lesser-known choreographers under the current statutory scheme.⁷

II. DANCE: HISTORY AND CREATION

A. Dance History

For centuries, cultures have expressed themselves by dancing,⁸ from African tribal dance to Japanese Kabuki to American ballroom.⁹ The history of ballet presents an interesting dynamic: unknown choreographers usually capture universal attention after entrenching themselves in an established company or building one that could provide financial backing and community support.¹⁰ Ballet originated in the fifteenth century in the form of French and Italian court dances, which were plotless works performed on opulent stage settings by aristocrats adorned in rich costumes.¹¹ By the mid-1600s, professional dancers and choreographers were a mainstay in the dance world.¹²

Louis XIV (1643-1715), a patron of various choreographers, pioneered professional ballet by developing steps still recognizable today.¹³ Most importantly, he established the first professional

7. For a discussion of how Copyright Act deficiencies can be remedied, see *infra* notes 213-16 and accompanying text.

8. See JACK ANDERSON, *BALLET AND MODERN DANCE: A CONCISE HISTORY* 13-30 (Princeton Book Co. 1992) ("As long as men and women have lived upon this earth, they have danced."). See generally SAMUEL NOAH KRAMER, *THE SUMERIANS: THEIR HISTORY, CULTURE AND CHARACTER* 100 (Univ. Chi. Press 1963) (stating Sumerians, first to develop usable and effective system of writing, used music, song, and dance as major source of entertainment); SAMUEL NOAH KRAMER, *HISTORY BEGINS AT SUMER: THIRTY NINE FIRSTS IN RECORDED HISTORY* 246 (Univ. Pa. Press 1981) (1956) (describing Sumerian celebrations).

9. See DEBORAH JOWITT, *TIME AND THE DANCING IMAGE* 8 (1988) (explaining how culture and dance often intertwined).

10. See ANDERSON, *supra* note 8, at 31-32 (crediting Catherine de Medici with bringing dance to French court from Italy); see also WALTER TERRY, *BALLET GUIDE: BACKGROUND, LISTINGS, CREDITS, AND DESCRIPTIONS OF MORE THAN FIVE HUNDRED OF THE WORLD'S MAJOR BALLETS* 2-4 (Dodd, Mead, & Co. 1976) (1959). Today, ballet companies exist all over the world in hundreds of cities. See TERRY, *supra* note 10, at 13. Although ballet has been called an outdated form inextricably linked to the aristocracy, many commentators describe ballet as a language, not a message. See ANDERSON, *supra* note 8, at 146. Ballet has been used to glorify the French monarchy, praise communism, describe elegant court ceremonies, and make people laugh. See *id.* "Throughout history, imaginative choreographers have devised new balletic steps and have found fresh uses for old ones." *Id.*

11. See TERRY, *supra* note 10, at 2-4 (stating Italy and France promoted the form).

12. See *id.* (finding professional dance emerged during mid-1600s).

13. See *id.* at 5 (stating first professional dance company, *L'Academie*, was established in 1661); see also ANDERSON, *supra* note 8, at 38-44 (crediting Louis XIV with

dance company, *L'Academie Royal de Danse* (“*Academie*”).¹⁴ *Academie* was best known for its opera ballets, in which dancers wore cumbersome, but elaborate, costumes reflecting exotic lands.¹⁵ Ballets of this period were the first to develop unified dramatic themes.¹⁶ Some of the staples of modern ballet — toe dancing and short skirts — appeared for the first time during this century.¹⁷

Some of the most popular ballets still performed today were created during ballet’s Romantic Period (1800s), debuting sophisticated storylines about love, supernatural beings, femininity, and exotic places.¹⁸ Ballets created during this period, such as *La*

popularization of professional ballet); RICHARD KRAUS, HISTORY OF THE DANCE IN ART AND EDUCATION 73 (1969) (stating Louis XIV is credited with popularizing professional ballet). Pierre Bouchamp, a dancer in Louis XIV’s court, was the first to specify the five positions of the feet still used today. See TERRY, *supra* note 10, at 5. Louis XIV was “probably as enthusiastic and helpful a patron as the dance has ever known.” KRAUS, *supra* at 73. He himself danced and took daily lessons from Bouchamp. See *id.*

14. See TERRY, *supra* note 10, at 5-6 (illustrating the story of *L'Academie*). Ladies took part in the ballets presented at court but hesitated to appear in the theater once *L'Academie* was established. See *id.* Young boys often played the parts of females. See *id.*

15. See ANDERSON, *supra* note 8, at 40-41 (detailing costumes worn during era). Most of the costumes designed for ballets during this period were inspired by Roman culture. See *id.* Nonetheless, because little scholarly research was done, the costumes were usually historically inaccurate. See *id.* The costumes were, therefore, made to look whimsical and exotic rather than reflective of the actual period. See *id.* For example, although it was not typical Roman attire, costumes of the time usually included a “wide hooped skirt of midlength length.” See *id.* at 41.

16. See *id.* at 59-60 (noting establishment of *ballet d'action*, expressive works based on love stories from mythology). While this form of dance emphasized “unity and drama,” previous forms of dance emphasized “variety and display.” See *id.* at 60.

17. See TERRY, *supra* note 10, at 5 (listing important dancers and events during era). Marie Taglioni is credited as the first to dance on the points of her toes and, in so doing, ushering in the romantic period of ballet. See *id.*

18. See ANDERSON, *supra* note 8, at 76-77 (discussing fascination with colorful and exotic themes). Female dancers were especially important at this time. See TERRY, *supra* note 10, at 5. There was intense competition between two female dancers in particular: Marie Taglioni and Fanny Essler. See ANDERSON, *supra* at 83-85. Equally important to the romantic period were Carlotta Grisi, Lucile Grahn, and Fanny Cerrito. See CAROL LEE, BALLET IN WESTERN CULTURE: A HISTORY OF ITS ORIGINS AND EVOLUTION 148-60 (1999).

Sylphide,¹⁹ *Giselle*,²⁰ *Coppelia*,²¹ *Swan Lake*,²² and *Sleeping Beauty*,²³ are typical examples of the dramatic and sophisticated storylines used by choreographers of the era. Under the guidance of influential choreographer, Marius Petipa, Russian ballet originated the three-act form for storytelling.²⁴

In the 1900s, Sergei Diaghilev opened a dance company called *Ballet Russe*, the harbinger of a new abstract phase in choreography.²⁵ Diaghilev recruited choreographer, Michale Fokine, and astonished the world with a superior cast and a creative new style.²⁶ His music was modern, his set designs showcased famous modern

19. See BALANCHINE & MASON, *supra* note 1, at 473-79 (describing *Sylphide* as story about fairy-like creature who destroys mortal men). The sylph is a common image in Romantic ballet — a woman in a pale, filmy garment with flowers crowning her head, pearls adorning her wrists and throat, and a set of dainty sheer wings sprouting from her shoulder blades. See JOWITT, *supra* note 9, at 29-30. In *Sylphide*, this mythical creature seduces a man, James, who forsakes his family, friends, and betrothed to follow her into the forest. See *id.* There, he dances with her and her fellow sylphs. See *id.* He falls wildly in love and strikes a bargain with the forces of darkness to secure his sylph with a magic scarf. See *id.* Tragically, the scarf causes her delicate wings to fall off, which results in her eventual demise. See *id.* In the end, James loses everything, and his betrothed and greatest rival marry. See *id.*

20. See BALANCHINE & MASON, *supra* note 1, at 193-209 (describing story as tale of scorned peasant woman who dies for love of dancing and tortures ex-lover in afterlife).

21. See *id.* at 75-92 (describing comedic story of doll-maker who creates life-sized doll and falls in love with her).

22. See *id.* at 432-58 (telling popular story of Swan Queen who makes deal with prince of darkness to enable her to become human during day when she meets her lover).

23. See *id.* at 393-420 (noting popularity of story about cursed princess who wakes only by true love's kiss).

24. See ANDERSON, *supra* note 8, at 101-12 (discussing Petipa's influence on Russian ballet and dance world).

25. See *id.* at 121-22 (describing innovation of Diaghilev's works); see also TERRY, *supra* note 10, at 8-9 ("For twenty years, until his death in 1929, Diaghilev and his company represented the peak of ballet . . ."). Diaghilev himself was not a dancer. See TERRY, *supra* note 10, at 8-9. He was a brilliant director with impeccable taste who gathered the most talented and creative people of his time to form a company. See *id.* Although Diaghilev was not a dancer, he had a major influence over all aspects of the company. See *id.* When he died, his company fell apart. See *id.*

26. See TERRY, *supra* note 10, at 8 (explaining how Diaghilev gathered choreographers and dancers for company). Dancing giants like Vaslav Nijinski and Anna Pavlova made the company famous. See *id.* Additionally, Fokine introduced "[n]ew techniques of dancing and staging, new creativity, [and] new artistic standards." *Id.*

artists, and his themes were exotic and sensuous.²⁷ These ballets expressed adult emotion in a compact, yet creative form.²⁸

Although Americans were always interested in dance, serious attention waxed and waned until choreographer, George Balanchine, revolutionized ballet.²⁹ At first, his work for the *American Ballet* was unpopular and often criticized as not “American enough.”³⁰ After forming the *New York City Ballet*, one of today’s largest and richest ballet companies, Balanchine gleaned respect and admiration for his abstract ballets.³¹

27. See ANDERSON, *supra* note 8, at 121 (noting well-known musicians and artists aided Diaghilev’s project). The company danced to music by significant composers like Stravinsky, Prokofiev, Ravel, Debussy, Richard Strauss, Satie, Falla, Milhaud, and Poulenc. See *id.* Set design was commissioned from famed visual artists such as Picasso, Matisse, Bakst, Benois, Derain, Braque, Utrillo, Miró, Tchelitchev, de Chirico, and Rounalt. See *id.*

28. See *id.* at 123 (describing choreographer Fokine’s innovations). Fokine criticized ballets of the romantic period for being too long and lacking in coherent unity. See *id.* As a result, his works were tightly organized and presented unified artistic images. See *id.* He also believed in creating a ballet style that was able to adapt to every different theme he tackled, rejecting an all-purpose balletic style. See *id.* His themes were what made him famous. See *id.* Compared with the sugary themes of past works such as *The Sleeping Beauty*, Fokine’s themes were temporarily described as “hot blooded.” See *id.*

29. See TERRY, *supra* note 10, at 9-12 (relaying story of American dance). John Durang has been called America’s first major dancer, mixing elements of folk dance and other forms. See *id.* Dance received some attention and then lagged for a while until dancers like famed ballerina Fanny Essler came to the United States from abroad. See *id.* Essler was so loved by American audiences that, at one point, Congress closed to watch her perform. See *id.* After her two-year stint, ballet waned again until Anna Pavlova “electrified an audience at the Metropolitan Opera House in 1910.” *Id.* at 11. A truly American identity did not develop until the 1930s with the founding of the School of American Ballet and its associated company, the American Ballet Theatre, headed by George Balanchine. See *id.* Philadelphia was also an important center for dance, producing great dancers like Durang, Lee, Maywood, and Smith. See *id.* Other troupes in Chicago and San Francisco helped popularize ballet in the United States. See *id.*

30. See ANDERSON, *supra* note 8, at 145-46 (explaining Balanchine’s failure to win over critics resulted from his failure to respond to social upheaval of era). At first, Balanchine was criticized by some of the most prominent ballet critics in the industry. See *id.* He created works at the end of the Great Depression and at the beginning of World War II, a time of intense nationalism. See *id.* “Because ballet was born in the courts of Europe, many people considered it an art for an oppressive aristocracy that had no place in democratic America.” *Id.* at 146. For a discussion of the repudiation of the idea that ballet represents aristocracy, see *supra* note 10.

31. See *id.* at 149-50 (discussing Balanchine’s formation of New York City Ballet Company and exploration of abstract ballet).

One does not have to master erudite theories to appreciate his choreography Through changes of movement quality, it often evokes moods or personal relationships. The movement may be tense or relaxed, abrupt or flowing, carefree or somber; and the ways the dancers move in space may suggest love or hate, attraction or repulsion.

Meanwhile, American dance claimed to have found its true voice through modern dance, which repudiated all forms of classical ballet under the theory that artistic individualism was supreme.³² The pioneer of modern dance was Isadora Duncan, famed for wearing simple tunics and dancing barefoot.³³ Ruth St. Denis and Ted Shawn's company, *Denishawn*, resembled Duncan's iconoclastic attitude by teaching their dancers many different forms of movement, instead of classical ballet.³⁴ *Denishawn* produced several significant modern dancers who went on to start their own troupes.³⁵ One of those dancers was Doris Humphrey, celebrated for highlighting balance and imbalance in dancing, something ballet tried to diminish.³⁶ Martha Graham was another former *Denishawn* dancer whose work emphasized breathing, an effort that ballet dancers attempted to conceal.³⁷ These pioneers led the way for many modern dancers to continually reinvent the form.³⁸

Id. at 150-51. Balanchine is best known for using traditional ballet steps in an original way. *See id.* at 152.

32. *See id.* at 165-66 (describing modern dance's encouragement of individualism and development of personal choreographic style); *see also* TERRY, *supra* note 10, at 11-12 (noting "non-balletic" movement during 1930s).

33. *See* ANDERSON, *supra* note 8, at 166-68 (explaining impact of Isadora, who claimed she discovered dance); *see also* TERRY, *supra* note 10, at 11-12 (listing pioneers of modern dance as Duncan, St. Denis, and Shawn).

34. *See* ANDERSON, *supra* note 8, at 168-71 (describing *Denishawn* training as including Oriental dance, Spanish dance, American Indian dance, Hindu dance, hulas, ballet, and others).

35. *See id.* at 171-78 (describing many defections from *Denishawn*); *see also* TERRY, *supra* note 10, at 12 (explaining impact of Humphrey, Graham, and other "avant-garde" choreographers on ballet world).

36. *See* ANDERSON, *supra* note 8, at 175 (noting Humphrey's use of balance and imbalance). Humphrey described the states of balance and imbalance as "fall" and "recovery." *See id.* Her choreography highlighted the contrast between gravity and resisting gravity in order to emphasize equilibrium. *See id.*

37. *See id.* at 177 (noting Graham based technique on study of breathing). Graham examined the changes in the body while a person inhales and exhales and interpreted the process through "contraction" and "release." *See id.* Graham used contractions to express her idea that life itself was effort. *See id.* Her dances were passionate and had a percussive style. *See id.*

38. *See id.* at 179-91 (describing the lives and careers of influential choreographers in America). Lester Horton's dance group introduced a social conscience to the dance world, emphasizing the importance of social integration. *See id.* at 180. José Limón was a dancer and choreographer who brought power to modern movements. *See id.* His stage presence was mesmerizing because of his "combination of tragic dignity and proud defiance." *See id.* African American choreographers, especially Asadata Dafora, Katherine Dunham, and Pearl Primus, were pioneers in the 1930s. *See id.* at 181-82. These three choreographers combated racism and other social issues in their works: Dafora staged dance dramas on tribal life, Dunham used Caribbean and American black themes, and Primus combined African rituals and the American South. *See id.* Finally, Alvin Ailey put together a dance company in the 1960s that became one of the most popular modern dance groups. *See id.* He commissioned choreographers like Beatty, McKayle, Eleo Pomare, Di-

B. Creation

The creation process for a choreographic work is unique to every choreographer but is, nonetheless, important for understanding copyright protection.³⁹ It may take weeks, months, and even years to create a true choreographic masterpiece.⁴⁰ In the days of the full-length ballet, the process of creating a choreographic work often centered on telling a highly developed story.⁴¹ Today, the work may be more abstract, centering on the choreographer's interpretation of a thought, shape, idea, or emotion through movement.⁴²

The process begins when the choreographer thinks of his or her initial inspiration in the dance studio and translates that inspiration into a sequence of movements.⁴³ A choreographer might typically accomplish this by improvisation, during which he or she

anne McIntyre, Billy Wilson, and Bill T. Jones. *See id.* These choreographers represent the varied styles and many movements within modern dance, a form that has been termed the "phoenix of dance" because of its constant ability to reinvent itself. *See id.* at 165.

39. *See* SANDRA CERNY MINTON, *CHOREOGRAPHY: A BASIC APPROACH USING IMPROVISATION* 2 (2d ed. 1986) (calling choreography a process that is wonderful, yet mystifying). Choreography is mystifying because the choreographer is "able to energize a previously empty space and make it come alive." *See id.*

40. *See* MARY CLARKE & CLEMENT CRISP, *MAKING A BALLET* 26 (1974) (relating famed choreographer's description of choreography's creative process). "It may take a full month of rehearsals to set a single pas de deux, so that it flows easily and does not show ugly 'joins' between phrases." *Id.* (quoting statement of Sir Frederick Ashton).

41. *See id.* at 32 (stating choreographer's opinion that dance is too emotional to be abstract, thus choreography should not center on preparing steps but on expressing emotion or telling story); *see also* MINTON, *supra* note 39, at 64 (defining literal choreography as that which told stories). In many early modern dance pieces, literal choreography was a style that communicated a message or told stories. *See id.* at 64. In these stories, the choreographer had to create characters and communicate a story. *See id.* One example is Martha Graham's *Appalachian Spring*. *See id.*

42. *See* CRISP & CLARKE, *supra* note 40, at 26 (quoting famed choreographer Dame Ninette de Valois). "There must be an image; it is the spirit behind all choreography . . ." *Id.*; *see also* MINTON, *supra* note 39, at 64 (explaining nonliteral choreography as dance based on design, manipulation, and movement). A choreographer may choose a specific piece of music as the point of inspiration. *See id.* at 2-3. In order to express this through music, the choreographer would need to interpret the various intricacies and dynamics of the score. *See id.* On the other hand, if the choreographer chooses to interpret an emotion, he would investigate the nuances of these feelings. *See id.*

43. *See* MINTON, *supra* note 39, at 4 (explaining third step in creative process is "creative act" in which choreographer discovers movement for dance); *see also* CRISP & CLARKE, *supra* note 40, at 29 (citing two choreographers' practices when creating dance work). Sir Frederick Ashton once said, "[w]hen I start rehearsals I have a fairly clear picture in my mind of what I have got to do — the story that has to be told, the characters that have to be created, the formal dances that have to be composed — I erect scaffolding so to speak . . ." *Id.* George Balanchine ex-

concentrates on a motivation and begins moving until a sequence of steps takes shape.⁴⁴ There is no specified form a choreographer must follow; instead, he or she may be motivated by inner cues and images.⁴⁵

The choreographer polishes those initial movements so the dancers who will actually perform the work can try to execute them.⁴⁶ The choreographer and dancers must then consider whether the steps are feasible, whether the sequence is workable in the space provided, and whether the sequence properly expresses the choreographer's idea.⁴⁷ After weeks of practicing and refining the steps, the dancers are ready to take the stage.⁴⁸ At this point, the choreographer must consult with specialized designers for the

plained, "[b]efore beginning rehearsals I have an idea of what the general scheme of the ballet will be." *Id.*

44. See MINTON, *supra* note 39, at 6-7 (suggesting discovery of movement through improvisation is beneficial for novice choreographers).

45. See *id.* (listing examples of exploration and improvisation process). For example, a motivation might be a shape. See *id.* The choreographer explores that motivation by moving the body to reflect the shape. See *id.* The choreographer would continue improvising by engaging other parts of the body to reflect that shape. See *id.* Another example of a motivation would be gravity. See *id.* The choreographer would explore that motivation by moving the body to discover the effect of gravity. See *id.* The choreographer would improvise by moving other parts of the body in different ways to explore the effect of gravity on those parts of the body. See *id.*

46. See *id.* at 3-4 (claiming choreographic research includes understanding of selected dancers' movement preferences and styles). Part of the creation process includes visualizing where specific dancers might be best suited to perform specific parts of the choreography. See *id.* In so doing, a choreographer may be able to showcase the talents of certain dancers. See *id.*

47. See *id.* at 24-31 (emphasizing space, time, energy, and shape as elements considered before choreography proceeds). See generally DANIEL LEWIS, THE ILLUSTRATED DANCE TECHNIQUE OF JOSÉ LIMÓN 11 (Harper & Row 1984) (emphasizing importance of dancers in creative process). "Dancers are part soldier, part gladiator and part matador. They possess the disciplined courage of the first, the brute daring of the second, the finesse of the last." *Id.* (quoting José Limón). By manipulating various elements, the choreographer is able to make sure the movement communicates the choreographer's theme. See MINTON, *supra* note 39, at 32-34.

48. See MINTON, *supra* note 39, at 76-101 (reciting process of "staging" choreographed work). There are several steps in the staging process. See *id.* at 76. First, the choreographer conducts stage rehearsals so the dancer can get a feel for the performance space, which is often different from the rehearsal studio. See *id.* at 77-78. Next, the choreographer conducts technical and dress rehearsals. See *id.* The technical rehearsal tests the aesthetic of the work with lighting, and the dress rehearsal tests feasibility of the costume designer's final costume. See *id.* at 78-80. Next, the choreographer must make sure all aspects of the musical accompaniment, whether live or recorded, are in place. See *id.* at 83. After fine-tuning all of these aspects, the choreographer is ready to take his work to be performed on stage. See *id.* at 100-01.

final elements: costumes, lighting, and sets.⁴⁹ The finished product allows the audience to observe the whimsy of Balanchine's *The Nutcracker*, the emotion of Graham's *Appalachian Spring*, or the stunning precision of Cunningham's *Summerspace*.

III. SYSTEMS OF PROTECTION AND ENFORCEMENT

The protections available to choreographers are either through the copyright system or the community custom system.⁵⁰ Since copyright law often fails to protect lesser-known choreographers who do not have the finances or time that larger companies have, those choreographers rely on an elaborate system of dance community pressures and customs.⁵¹

A. Protections

1. *Protections Under the Copyright Act*

Congress is able to protect artistic works through a system of copyrights under Article I, section 8, clause 18 of the Constitution.⁵² Under section 8, Congress is given the power to promote the progress of the "useful arts," by securing artists' rights to their "writings and discoveries."⁵³ Congress first exercised its power over the "useful arts" in 1909 when it created the third revision of the Copyright Act.⁵⁴ At the time the Act was adopted, choreography was not mentioned.⁵⁵ It was understood that dance fit under the "dramatic works" prong of the Act.⁵⁶ For a work to be considered

49. *See id.* at 84-95 (stating necessary considerations made by costume, lighting, and set designers). A costume designer must take her cues from the choreographer's notes and sketches. *See id.* The costumes will use color, fabric weight, and style to accentuate the body build and height of the dancers and to reflect the choreographer's purpose. *See id.* The lighting scheme will utilize color and special effects to highlight the choreographer's design. *See id.* The set design frames the dance space. *See id.*

50. For a comparison of protections under the Copyright Act and those under community customs, see *infra* notes 52-161 and accompanying text.

51. For a discussion on the enforcement of protections, see *infra* notes 162-95 and accompanying text.

52. *See* U.S. CONST. art. I, § 8, cl. 18 (listing powers of Congress with respect to patents and copyrights).

53. *See id.* "[Congress shall have Power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

54. *See* Copyright Act of 1909, 35 Stat. 1075 (1909) (superceded by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, codified at 17 U.S.C. §§ 101-810 (1976)).

55. *See id.*

56. *See id.* *But see* Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. the Custom of the Dance Commu-*

“dramatic,” it had to illustrate a storyline, develop a set of characters, or depict an emotion.⁵⁷ Many ballets created at this time met the criteria for a dramatic work, but the modern dance revolution revealed the need for revision.⁵⁸ Many modern and contemporary works like those of Merce Cunningham were not covered.⁵⁹

In 1976, the Copyright Act was revised to include protection for choreographic works by recognizing them as an independent category of copyrightable subject matter.⁶⁰ After the revision, abstract choreographic works were made copyrightable in their own right, regardless of dramatic content.⁶¹ According to the revised

nity, 38 U. MIAMI L. REV. 287, 298-99 (1984) (explaining how “dramatic works” rubric was inappropriate when applied to dance, resulting in inability to protect choreographic works). The dance community has consistently refused to classify choreography as a form of drama. *See id.* Choreographers view dance as a completely distinct art form. *See id.* Although dance is able to depict a story through movement, it is able to depict so much more. *See id.* Furthermore, dance uses unique elements that are not present in other art forms, such as the arrangement of movement in time and space and use of the human body as the sole tool for expression. *See id.*

57. *See Horgan v. Macmillan, Inc.*, 789 F.2d 157, 160 (2d Cir. 1986) (describing dramatic quality needed under old Copyright Act).

58. For a discussion of ballets that met the criteria of a dramatic work, see *supra* notes 16-24 and accompanying text. For a discussion of ballets that explored abstract themes and did not express storylines, see *supra* notes 31-38 and accompanying text.

59. *See Singer, supra* note 56, at 299 n.50 (claiming choreography did not start with concern for storyline); *see also* Patricia Solan Gennerich, *Copyright: One Moment in Time: The Second Circuit Ponders Choreographic Photography as a Copyright Infringement: Horgan v. Macmillan, Inc.*, 53 BROOK. L. REV. 379, 380 (1987) (noting abstract choreographers like Martha Graham, Alvin Ailey, Merce Cunningham, and Twyla Tharp now enjoy increased protection); Adaline J. Hilgard, Note, *Can Choreography and Copyright Waltz Together in the Wake of Horgan v. Macmillan, Inc.*?, 27 U.C. DAVIS L. REV. 757, 759 (1994) (describing plight of choreographers left unprotected under old copyright scheme). Choreographer, Agnes De Mille, was not given copyright protection for her choreography in the popular musical, *Oklahoma!*, because, at the time, choreography was not copyrightable. *See id.* at 759. Producers of the show paid De Mille \$15,000 for her work. *See id.* In its first fifteen years, the show earned an estimated \$60 million in royalties from various adaptations. *See id.* Although De Mille did not receive any money for those subsequent adaptations of her original work, musical directors, Rogers and Hammerstein, continue to earn royalties for adaptations of their original score. *See id.* Since that time, De Mille has registered over eighteen works for copyright. *See Singer, supra* note 56, at 289 n.10 (listing choreographers who have registered works).

60. *See* 17 U.S.C. § 102(a)(4) (2000). *See generally* 18 AM. JUR. 2D, *Copyright and Literary Property* § 29 (1994) (stating choreography explicitly recognized as copyrightable).

61. *See* § 102(a)(4). The Copyright Act provides, in pertinent part: Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

.....

Act, protection is afforded to works that are (1) “choreographic works,” (2) original, and (3) fixed in a tangible medium or expression.⁶²

Thus far, the Act’s impact is ambiguous because the three requirements for copyright pose problems for choreographers. The revised Act does not include a definition of “choreographic work” because legislators believed the meaning to be fairly settled.⁶³ The legislative history suggests simple sequences of basic dance steps are not choreographic works.⁶⁴ The element that propels simple sequences into the realm of copyrightable works is unclear.⁶⁵ Yet, legislators did suggest certain sequences, once a part of a choreographic work, might be copyrightable as the building blocks

(4) pantomimes and choreographic works

Id.

62. See Lauren B. Cramer, *Copyright Protection for Choreography: Can It Ever Be ‘En Pointe’?*, *Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography*, 1 SYRACUSE J. LEGIS. & POL’Y. 145, 147 (1995) (discussing requirements of Copyright Act).

63. See H.R. REP. NO. 94-1476, at 53 (1976); see also William J. Fishkin, Comment, *Next on Floor Exercise, Dominique Dawes®: The Difficulties in Copyrighting Athletic Routines*, 11 SETON HALL J. SPORT L. 331, 334 (2001) (noting absence of definition for choreographic works as odd because Act defines architectural, audiovisual, literary, pictorial, graphic, and sculptural works, motion pictures, and sound recordings). See generally Leslie Erin Wallis, Comment, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1452-56 (1986) (stating various definitions of choreography). In light of the legislative history’s inability to define choreography, some authors use the dictionary definition, “the art of symbolically representing dancing . . . the composition and arrangement of dances . . . or a composition created by this art.” See Fishkin, *supra*, at 334 (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 292 (10th ed. 1998)). George Balanchine defined choreography as “movement used to produce visual sensations.” See Wallis, *supra*, at 1446. Still, the definition of choreography may not be so straightforward, because many kinds of movement are included in this definition. See Fishkin, *supra*, at 334. For example, sports routines, like figure skating, synchronized swimming, or rhythmic gymnastics, erotic dancing, and perhaps even bullfighting, may contain elements of choreography. See *id.* at 335.

64. See H.R. REP. NO. 94-1476, at 53-54 (stating “‘choreographic works’ do not include social dance steps and simple routines”).

65. See generally Brendan McCarthy, *Giannandrea Poesio on Ballet into the 21st Century*, at http://www.ballet.co.uk/magazines/yr_02/dec02/interview_giannandrea_poesio.htm (last visited Feb. 14, 2003) (discussing importance of other elements besides sequences of steps). What makes something a “choreographic work” is more than just a sequence of steps. See *id.* According to Giannandrea Poesio, a noted dance critic, dancers are no longer trained properly because they are predominantly taught the bare steps of the choreographic work. See *id.* “Today’s training focuses overly on dance’s physical dimension and neglects the ‘complementary disciplines,’ dance’s social context and history.” *Id.* To perform a work adequately, the author suggests dancers should know the background and history of their roles. See *id.* For example, *Sleeping Beauty*, often regarded as a pretty ballet about a princess, was actually created as a piece of political propaganda. See *id.* It is important for a dancer to be aware of these historical points in order to recreate a choreographic work. See *id.*

of a choreographic work.⁶⁶ Legislators also failed to define the second prong, originality, making it difficult to assess what works will meet the requirement.⁶⁷ There are numerous difficulties with the third element, fixation.⁶⁸ The acceptable methods of fixation for choreographic works are dance notation, film, and the more tenuous computer software.⁶⁹ In the dance world, however, fixation in any of these forms is often unworkable or unnecessary, since dancers and companies usually pass down choreographic works from memory.⁷⁰

Even though dance is now recognized as a copyrightable medium, adjudicating copyright infringement is difficult for lesser-known choreographers.⁷¹ In assessing whether there has been copyright infringement of a choreographic work, a court looks at whether the alleged copy is “substantially similar” to the original.⁷²

66. See H.R. REP. NO. 94-1476, at 54 (stating “compilations of dance steps may be copyrightable”).

67. See Singer, *supra* note 56, at 300-01 (describing obscurity in originality element).

68. See *id.* at 301-04 (enumerating fixation difficulties for choreographic works).

69. See *id.* (listing two forms of fixation available as notation and video recording); Cramer, *supra* note 62, at 151 (describing availability of computer programs to fix choreography). In 1983, scientists began experimenting with computer programs. See Singer, *supra* note 56, at 301 n.62. At that time, Eddie Dombrower produced the *Dance on Microcomputers* program, allowing “the viewer to see an animated dancer from all angles at regular speed, in slow motion, and by freeze frame.” *Id.* (citing *Computer Choreographs Dance Steps*, PERSONAL COMPUTING, JUNE 1983, at 215).

70. See ANDERSON, *supra* note 8, at 1 (stating choreography preserved in memory of those who perform works). See generally Singer, *supra* note 56, at 301 (claiming fixation theoretically at odds with dance because dance “intangible work of art that lives primarily through performance instead of recordation”). Balanchine claimed he was unconcerned with preserving his works. See *id.* at 301 n.61. He claimed, “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.” *Id.* (citing SELMA J. COHEN, DANCE AS A THEATRE ART: SOURCE READINGS IN DANCE HISTORY FROM 1851 TO THE PRESENT 187, 192 (1974)). But see Lynn Garafola, *Ballet into the 21st Century: Forward to the Future*, at http://www.ballet.co.uk/magazines/yr_02/dec02/lynn_garafola_ballet_future.htm (last visited Feb. 14, 2003) (describing method of preserving dance works). Lynn Garafola claims Diaghilev’s works have virtually disappeared because many companies who originally performed his works have subsequently collapsed, leaving no heirs. See *id.* According to Garafola, when tastes in the dance world shift and the demand for certain works disappears, there is a potential the work will be lost forever. See *id.*

71. See Hilgard, *supra* note 59, at 758 (stating first case to interpret Copyright Act with respect to dance was *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986)).

72. See *id.* at 771-73 (explaining fractured application of substantial similarity test). The cases judging copyright infringement have not given one single, consistent definition for “substantial similarity.” See *id.* at 771. “In *Horgan*, the appellate court articulated the standard as whether an ordinary observer, who viewed both

The Second Circuit has found it is possible for still photographs of a choreographic work to infringe on the copyright of a work.⁷³ In *Horgan v. Macmillan, Inc.*, the estate of choreographer, George Balanchine, moved to enjoin the publication of a book about his work, *The Nutcracker*.⁷⁴ The district court denied the injunction, reasoning Balanchine's choreography could not be reproduced from the still photographs in the book.⁷⁵ The court of appeals reversed, finding a substantial amount of choreographic material could be reproduced from still photography.⁷⁶ The court found if the snapshot was qualitatively significant, although quantitatively small, it might be sufficient to constitute infringement, even if the excerpt could not recreate the full original work.⁷⁷ Because the district court used an incorrect standard, the court remanded the case, but the matter was eventually settled out of court.⁷⁸

Finally, a widely discussed issue among scholars is the proper remedy for copyright infringement.⁷⁹ The Copyright Act affords economic protection for most artistic forms by compensating in-

the plaintiff's original work and the defendant's allegedly infringing work, would be disposed to overlook their disparities and perceive their aesthetic appeal as substantially the same." *Id.* at 772.

73. See *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 162-64 (2d Cir. 1986); see also Hilgard, *supra* note 59, at 772-73 (explaining appellate court's remand to trial court to determine whether photographs in this case were qualitatively similar using substantial similarity test).

74. See *Horgan*, 789 F.2d at 158-59 (discussing plaintiff's complaint); see, e.g., Cramer, *supra* note 62, at 145 (stating plaintiff was only one to bring case of choreographic copyright infringement under Copyright Act). "Since the revision, only one case of infringement of a choreographic copyright has reached the courts, which suggests that the Act has not been a useful tool for the choreographic community." *Id.*

75. See *Horgan*, 789 F.2d at 160 (noting trial court decision). The court found the still photographs could not be used to reproduce Balanchine's work, just as a Beethoven symphony could not be recreated from a document containing every twenty-fifth chord of the symphony. See *id.* at 160 n.1.

76. See *id.* at 162-63 (explaining court of appeals' reasoning). The court of appeals claimed a snapshot of a single moment in a sequence of steps could capture a gesture, the composition of the dancers' bodies, the placement of dancers on the stage, and even the viewer's perspective in watching the particular movement. See *id.* at 163. According to the court, a single instant communicates far more than a single chord of a Beethoven symphony. See *id.*

77. See *id.*; see, e.g., Gennerich, *supra* note 59, at 382 (stating case was eventually settled out of court).

78. See *Horgan*, 789 F.2d at 162-64.

79. See Jimmy A. Frazier, Comment, *On Moral Rights, Artist-Centered Legislation, and the Role of the State in Art Worlds: Notes on Building a Sociology of Copyright Law*, 70 TUL. L. REV. 313, 335 (1995) (opining American law anomalous in granting only economic rights and overlooking moral rights).

jured artists with monetary damages.⁸⁰ Because choreographers are primarily concerned with preserving the character of their work, monetary damages are often inadequate.⁸¹ Ultimately, most choreographers are inclined to forego copyright protection and rely instead on the customs of the dance community to ensure their works will be performed with artistic integrity.⁸²

The three elements of the Copyright Act — choreography, originality, and fixation — may have unique consequences for unknown choreographers.⁸³ Although the Act protects dance works in theory, these elements make it especially difficult for most choreographers to acquire the Act's protection.⁸⁴ If the Act actually protects dance works at all, it can protect only those choreographic works created for large companies.⁸⁵

a. Choreography

Choreography is the only copyrightable form not defined in the Copyright Act.⁸⁶ According to legislative history, the decision

80. See Singer, *supra* note 56, at 304-07 (comparing result of economic rights for smaller choreographers and well-known choreographers); see also Frazier, *supra* note 79, at 335-37 (claiming economic rights not enough and French law may protect artists' moral rights).

81. See Singer, *supra* note 56, at 304-07 (claiming choreographers will be disappointed with results under Copyright Act); see also Frazier, *supra* note 79, at 335-36 (noting provisions in French law that protect artists). Under the Copyright Act, a copyright holder is endowed with the right to reproduce, prepare derivative works, distribute copies, perform, and display the work. See Singer, *supra* note 56, at 304-05. French law recognizes moral and economic rights and extends protection so the artist has the right of disclosure, retraction, attribution, and integrity. See Frazier, *supra* note 79, at 335-36. The right of disclosure is the right to release the work to the public as the artist sees fit. See *id.* at 336. Similarly, the right of retraction is the right to take the work out of the public sphere if the artist deems such action necessary. See *id.* The right of attribution includes the right to be recognized as the creator of the work, the right to keep others from being falsely identified as creators, and the right not to be named falsely as the creator of another work. See *id.* Finally, the right of integrity is "the right to prevent, even beyond the point of distribution, a work's alteration, mutilation, or destruction." *Id.* at 337 (footnote omitted).

82. See Singer, *supra* note 56, at 318-19 ("The custom of the American dance community does, however, provide choreographers with a realistic, effective mechanism for the enforcement of their artistic rights.").

83. For a discussion of the three elements of the Copyright Act, see *infra* notes 86-140 and accompanying text.

84. For a discussion of how the Copyright Act's three elements affect choreographers, see *infra* notes 86-140 and accompanying text.

85. For a discussion of the particular difficulties that unknown choreographers face in meeting each element of the Act, see *infra* notes 86-140 and accompanying text.

86. See Fishkin, *supra* note 63, at 334 (noting absence of definition for choreography strange because Act defines other forms); see also Wallis, *supra* note 63, at 1452 (suggesting absence of definition by Congress may have been prevention of

to leave out a definition was deliberate because legislators believed the meaning to be well settled.⁸⁷ Although defining it negatively to exclude “social dance steps and simple routines,” Congress neglected to consider many newer, abstract, and sometimes obscure, works.⁸⁸ In addition, because legal definitions of a term often differ from common parlance, Congress’s lack of guidance in this area has left choreographers wondering if their works are protected.⁸⁹ It is unclear whether storylines are still required, whether incorporation of social dances is completely eliminated, and whether different kinds of movement will be considered choreography.⁹⁰

Since choreography is not defined, the extent to which a storyline has been completely eliminated as a requirement for protection remains unclear.⁹¹ Because Article I, section 8 of the Constitution allows Congress to protect only the “useful” arts, there is a danger of moral relativism.⁹² Case law suggests the definition of choreographic works still includes some notion of a storyline, which may adversely affect the most creative and groundbreaking works of our times.⁹³ Many current choreographers focus merely on move-

being too broad or too narrow). For a discussion of the lack of definition for choreographic works, see *infra* notes 117-34 and accompanying text.

87. See Wallis, *supra* note 63, at 1452 (explaining legislator’s view that meaning of choreography was fairly well settled).

88. See *id.* at 1452-55 (stating definition in negative terms created several problems).

89. See *id.* at 1452-53 (explaining legal terms exponentially difficult to interpret without court guidance). Choreography is an obscure term. See *id.* In addition, “[t]he legal meaning of a term often differs from its accepted meaning in common parlance.” *Id.* at 1452.

90. For a discussion of problems associated with the Copyright Act’s failure to define choreography, see *infra* notes 91-104 and accompanying text.

91. See Singer, *supra* note 56, at 297-99 (discussing importance of storyline element as subconscious measure of copyrightability).

92. See *id.* at 299. “Courts have interpreted this restriction as an invitation to judge the moral worth of choreographic works. 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.” *Id.* (footnote omitted).

93. See *id.*; see also Fishkin, *supra* note 63, at 335-36 (describing elements in erotic dancing as inferior to classical ballet but protected under Copyright Act) (citing *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), *rev’d on other grounds*, 501 U.S. 560 (1991)). Judge Posner’s concurring opinion in *Miller* elucidated the elements that make certain sporting events choreographic. See *id.* In analogizing erotic dancing to bull fighting, Posner theorized the sport united music, pageantry, and costumes and, thus, had artistic elements. See *id.* Yet, because of public policy concerns, namely the desire to protect animals from this sport, bullfighting was not considered an artistic endeavor. See *id.* at 336.

ment, despite legislative history that suggests the Act was not intended to protect bare movement.⁹⁴

Without a definition for choreography, sophisticated social dance steps incorporated in an overall choreographic work may not obtain protection.⁹⁵ “A total ban on the copyright of social dance steps could effectively exclude original and creative social dance step works choreographed for Broadway shows or for films”⁹⁶ Many unwitting choreographers desiring to create a work with such steps might be unable to gain protection under the Act.⁹⁷ Depending on the choreographic work, social dance steps could be original enough to merit copyright protection.⁹⁸ Therefore, this negative definition may be insufficient to clarify choreography.⁹⁹

Another problem with failing to define choreography is that it remains unclear whether the many different kinds of movement are outside the classification of “dance.”¹⁰⁰ Specifically, some authors opine sports routines should be included as choreographic works.¹⁰¹ Sports routines are markedly different from dance routines. In a dance work, there are no specific “steps” that must be completed in the routine, like the double axle in a skating routine or the back flip in a gymnastics floor exercise. There is no expecta-

94. See Wallis, *supra* note 63, at 1453 n.79 (explaining pure movement on stage loses protection because falls between choreography and dramatic works). Although the court excluded pure movement on stage from protection as a choreographic work, it is difficult to determine the line between pure movement and a choreographic work. See *id.*

95. See *id.* at 1453 (finding dances like Waltz, Fox Trot, and Rhumba will be excluded from copyright protection as choreographic work because classified as “social dances”).

96. *Id.* Although copyright protection for these types of dances is beneficial, there are reasons for excluding them from protection. See *id.* If included as copyrightable dances, no one could perform these dances in any social setting once a choreographer obtained copyright protection of them. See *id.* at 1453-54. In such a situation, no one could dance a Waltz without first obtaining permission from the copyright holder. See *id.* at 1454.

97. See *id.* at 1453-54 (stating individual social dance elements would be unprotected).

98. See *id.* at 1454 (explaining how social dance steps may be original enough to merit protection). Determining whether social dance steps are original might be a difficult task. See *id.* Some suggest expert witnesses and fact finders, the typical adjudicators of copyright claims, are capable of making this determination. See *id.* at 1454-55.

99. See Wallis, *supra* note 63, at 1455 (“The Congressional attempt to exclude social dance steps without justification, thereby potentially excluding individual, original steps in a choreographic work, is an unwarranted intrusion into an area better left to the courts.”).

100. See Fishkin, *supra* note 63, at 334-35 (claiming lack of clarity in definition creates particular problems for other forms of movement).

101. See *id.* at 332 (opining athletic routines may be deserving of copyright protection when performed in noncompetitive setting).

tion that certain steps be executed in a dance routine. Additionally, there are an infinite number of ballet and modern steps that can be combined in an infinite number of ways.¹⁰² Some authors have likened sports routines to choreographic works, suggesting these routines merit copyright protection despite the potentially massive implications for televised sports coverage.¹⁰³ Because the Copyright Act did not specify which kinds of movements were considered “choreographic works,” it is unclear whether these works will receive protection.¹⁰⁴

b. Originality

In addition to qualifying as a “choreographic work,” a choreographer’s creation must be deemed “original” to qualify for copyright protection.¹⁰⁵ In the context of copyright law, this means the choreographer “must [independently] create the work with [his or her] own skill, labor, or judgment.”¹⁰⁶ Courts have not explained what level of originality is needed to qualify, yet choreographers

102. See generally TERRY, *supra* note 10, at 14 (describing how one specific step can be performed several different ways). In addition to the infinite number of steps in ballet and modern dance, one common step in ballet can be executed a number of different ways, resulting in a different step altogether. See *id.* For example, most ballet dancers know how to execute a *fouetté*. See *id.* A *fouetté* is executed when a dancer turns on one leg while using her head to “spot.” See *id.* A dancer “spots” by focusing on an object while his or her body turns, and when the “stretch of the neck has reached its limit (about half a turn), he snaps his head around and refocuses immediately on the same object.” *Id.* The dancer repeats this process until the turns are completed. See *id.* This can be varied by focusing on four selected places instead of one. See *id.* The turn can also be varied by eliminating “spotting,” as did Ted Shawn in his piece, *Whirling Dervish*. See *id.*

103. See *id.* at 334-35 (substituting Webster’s definition of choreography for legislator’s definition and finding it adequate to include certain sports routines in definition). According to Fishkin, it cannot be contested that had George Balanchine created a dance on ice skates, that work would be protected. See *id.* at 339.

104. See Fishkin, *supra* note 63, at 350.

105. See Singer, *supra* note 56, at 300 (describing originality as element for copyrightability); see also Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 267 (1999) (listing requirements for choreography to qualify for copyright protection). See generally Beth Freemal, Comment, *Theater, Stage Direction & Copyright Law*, 71 CHI.-KENT L. REV. 1017, 1026 (1996) (describing requirements for copyrights of theatrical works).

106. See Swack, *supra* note 105, at 278 (citing *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355-57 (1991)); see also Singer, *supra* note 56, at 300 (defining originality in terms of copyright protection) (citing *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951)). Other definitions of originality not included in the Copyright Act are “unusual” or “novel.” See Singer, *supra* note 56, at 300. Nevertheless, certain characteristics like “quality, aesthetic merit, ingenuity, and uniqueness are not considered in determining the copyrightability of a work.” Swack, *supra* note 105, at 278.

customarily borrow elements from other choreographers who inspire them.¹⁰⁷

In determining what Congress meant by originality in choreography, many commentators compare it to originality in music.¹⁰⁸ In analyzing the originality of a musical composition, courts look to the three building blocks of such works: rhythm, harmony, and melody.¹⁰⁹ Most importantly, the court relies on whether the work bears the author's personal stamp.¹¹⁰ If the court finds the rhythm, harmony, and melody are recognizable, but the author's imprint is innovative, the overall work will be deemed original.¹¹¹

Relying on this analogy to music, many commentators argue that a court determining originality in choreography should look at three building blocks: rhythm, space, and movement.¹¹² Furthermore, they argue the work should be considered original if it bears the choreographer's personal stamp.¹¹³ Since some ballets may use many of the same steps, a choreographer's interpretation will be the deciding factor for determining originality.¹¹⁴

One reason choreographers will not rely on copyright is their skepticism of a court's ability to determine originality in choreographic works, especially if the works are obscure or abstract.¹¹⁵ Because newer choreographers often push the envelope, many are concerned that courts are ill-equipped to make artistic judgments

107. See Swack, *supra* note 105, at 278 (stating question not yet addressed by courts); see also Singer, *supra* note 56, at 300 (noting level of originality not yet defined by courts).

108. See Singer, *supra* note 56, at 300 (providing guidance in interpreting originality requirement by comparing to musical works).

109. See Swack, *supra* note 105, at 278 (calling three elements of music "building blocks" used by composer); see also Singer, *supra* note 56, at 300 (noting three elements establish basic fingerprint of work). These three elements are described as fingerprints, those elements that establish the identity of the work. See *id.*

110. See Swack, *supra* note 105, at 278 (recognizing composer's imprint as determinative of originality); see also Singer, *supra* note 56, at 300 (describing requirement that composer inject "something new and recognizably his own" as determinative).

111. See Swack, *supra* note 105, at 279 (concluding resulting work is copyrightable regardless of familiarity of building blocks); see, e.g., Singer, *supra* note 56, at 300 (concluding same).

112. See Swack, *supra* note 105, at 279 (suggesting rhythm, space, and movement should be considered in originality analysis); see, e.g., Singer, *supra* note 56, at 300 (suggesting same).

113. See Swack, *supra* note 105, at 279 (opining choreographer's ingenuity must be recognizable for originality requirement); see, e.g., Singer, *supra* note 56, at 300-01 (finding well-known or often used steps are irrelevant if author's own stamp is present).

114. See Singer, *supra* note 56, at 300-01 (concluding choreographer's interpretation most important).

115. See *id.* at 301 (calling choreographer's concern legitimate).

about their works.¹¹⁶ When choreographers draw this inference, they are unlikely to seek copyright protection.¹¹⁷

Choreographers are also wary of copyright protection if they are creating a derivative work, which is a work that is original but based in part, or in whole, on a preexisting work.¹¹⁸ To satisfy the originality prong of the Act, a choreographer must show the work is a “distinguishable variation” that is more than trivial.¹¹⁹ In such a case, the choreographer is afforded copyright protection for only the original elements, not the entire work.¹²⁰ Therefore, if a choreographer is able to transform a classical ballet piece into another form, such as modern dance, protection is not available for the classical elements even though the choreographer used considerable craftsmanship and ingenuity to transform the work.¹²¹ The inability to copyright such a commission makes the idea of obtaining copyright protection too burdensome to justify.

116. *See id.* (noting concern that courts lack expertise). Conversely, by refusing to submit their copyright infringement cases to a court, they effectively prevent courts from ever reaching such questions. *See id.* It is theoretically possible courts might be able to adjudicate choreographic originality because they have been able to resolve such questions for musical compositions. *See id.* at 300.

117. *See id.* at 301 (citing choreographers’ concern that copyright protection is inadequate).

118. *See Swack, supra* note 105, at 282 (describing derivative works as separately copyrightable if “based in whole, or a substantial part, upon a preexisting work . . . [and] it satisfies the requirements of originality”). A work can be derivative in one of two ways: (1) it can transform the steps in some material way, or (2) it can be specially choreographed to a different specified musical score. *See id.* at 283. In both of these cases, the resulting work would be different from the preexisting work. *See id.*; *see also Singer, supra* note 56, at 305 (explaining many companies today create derivative works by restaging classics). “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.” *Singer, supra* note 56, at 305.

119. *See Swack, supra* note 105, at 282 (enumerating requirements for originality). The two requirements — that a choreographer (1) make a distinguishable variation and (2) make it more than trivial — lead to the inference that the work transforms the preexisting work with “more than a minimal contribution.” *Id.* at 282-83. If the work does this, it is proclaimed original. *See id.* at 282.

120. *See id.* at 283 (noting only choreographer’s additional steps to preexisting work are copyrightable).

121. *See id.* (explaining only choreographer’s additional steps to preexisting work are copyrightable). In addition, this test might not fit choreography correctly because choreographers frequently restage classical ballets. *See id.* at 283 n.86. For example, *Swan Lake* has been restaged at least sixteen times since its first performance in 1877. *See TERRY, supra* note 10, at 316-18. Restaging a classical ballet requires many modifications and adjustments according to the size of the stage and the preferences of the dancers. *See Swack, supra* note 105, at 282. Courts might consider these modifications to be distinguishable variations that are, in at least some cases, more than trivial. *See id.*

c. Fixation

Under the Copyright Act of 1976, a choreographic work must be fixed in a medium so that it may be perceived, reproduced, or otherwise communicated in the future.¹²² Although copyright registration is a mere twenty dollars, the requirement that a choreographic work be fixed forces lesser-known choreographers to incur burdensome costs.¹²³ Methods of fixation for choreographic works include dance notation, videotape, and computer programs.¹²⁴ Each method has its advantages and disadvantages.

Laban Dance Notation was developed in the eighteenth century when many dancers and choreographers prided themselves on reading and understanding notation.¹²⁵ The form declined in pop-

122. See 17 U.S.C. § 102(a) (2000) (stating fixation required for literary, musical, and dramatic works).

123. See Gennerich, *supra* note 59, at 381 (claiming initial monetary outlay for fixing choreographic works makes copyright registration unattractive). But see ANDERSON, *supra* note 8, at 1 (describing dance as “the most perishable of the arts”). “Many choreographers do not attempt to preserve their dances; some would not know how to go about doing so. Even today, when we have films and videotapes in addition to systems of dance notation, important works remain unrecorded.” *Id.*

124. See Cramer, *supra* note 62, at 148-50 (noting three methods of fixation as dance notation, film recording, and computer technology).

125. See ANDERSON, *supra* note 8, at 58 (stating history of dance notation). Pierre Beauchamp, who instructed Louis XIV, developed the idea of a notation system for preserving dances. See *id.* Raoul-Auger Feuillet later refined it into the universally accepted system of dance notation. See *id.* Feuillet’s early notation system could accurately detail the dances of his time. See *id.* The system was so widely known in the ballet community that “clergymen even complained that too many young ladies were keeping dance manuals, rather than Bibles, on their bedside tables.” *Id.* Today, the Dance Notation Bureau, founded in 1940, is dedicated to the preservation of dance through notation. See Singer, *supra* note 56, at 289 n.10. The Bureau assists choreographers, dance companies, and dancers in using notation to preserve their works and subsequently interpreting notation to recreate their works. See *id.*

Long was the dancing art unfixed and free;
Hence lost in error and uncertainty:
No precepts did it mind, or rules obey,
But ev’ry master taught a different way:
Hence ere each new-born dance was fully tried,
The lovely product, ev’n in blooming died:
Thro’ various hands in wild confusion tossed,
Its steps altered and its beauties lost:
Till Feuillet at length, great name! Arose,
And did the dance in characters compose:
Each lovely grace by certain marks he taught,
And ev’ry step in lasting volumes wrote.
Hence o’er the world this pleasing art shall spread,
And ev’ry dance in ev’ry clime be read;
By distant masters shall each step be seen,
Tho’ mountains rise and oceans roar between.
Hence with her sister-arts shall dancing claim,
An equal right to universal fame,

ularity later in the century because ballet steps became more complex, and innovative new styles of dance emerged.¹²⁶ Today, Laban Dance Notation remains the most accurate method for preserving and reproducing works.¹²⁷

Although extremely accurate, the expense and time involved in notating the average choreographic work make the method prohibitive for lesser-known choreographers.¹²⁸ Notation is a dying art form, and the rare professional who understands it typically charges twelve hundred dollars to fourteen hundred dollars for roughly twenty minutes of ballet.¹²⁹ Large companies with hefty foundations might have these resources, but lesser-known choreographers working with smaller companies do not.¹³⁰ Also, because many small companies cannot afford to pay their dancers for their time, the laborious and time-consuming notation process may not be a viable option.¹³¹

The advent and widespread use of video recording systems initially seemed to be an inexpensive and speedy solution to the fixation problem. The cost of video recording can be very little and yet still too expensive for some choreographers.¹³² Additionally, while

And Issac's rigadoon shall last as long

As Raphael's painting, or as Virgil's song.

ANDERSON, *supra* note 8, at 68-69 (quoting SOAME JENYENS, *THE ART OF DANCING* (Anne Cottis ed., Dance Books 1978) (1929)).

126. See ANDERSON, *supra* note 8, at 58 (describing decline of notation system). Perception of dance notation as a vestige of the aristocracy during the French Revolution was another reason for its abandonment at the end of the eighteenth century. See *id.*

127. See Singer, *supra* note 56, at 302 n.67 (stating notation allows ballet to be reconstructed even by someone who has never seen it performed). But see ANDERSON, *supra* note 8, at 125 (describing reconstruction of Nijinski's *Faune* from dance notation was different from original work). When the Julliard School's dancers reconstructed Nijinski's *Faune* from dance notation, the company overemphasized the original choreography's angularities. See *id.*

128. See Singer, *supra* note 56, at 302 n.66. Because most small choreographers lack the financial backing of large dance companies, Laban Dance Notation might be an unrealistic option for fixation. See *id.*

129. See *id.* at 302 n.66 (claiming twelve hundred dollars for notation of average ballet) (citing Thomas Overton, *Unraveling the Choreographer's Copyright Dilemma*, 49 TENN. L. REV. 594, 605-06 n.52 (1982)); see also Cramer, *supra* note 62, at 149 (noting estimated cost of dance notation).

130. See Singer, *supra* note 56, at 302-03 (describing National Endowment for the Humanities grants to Dance Notation Bureau for notation).

131. See *id.* (explaining difficulty in process of taking notation).

132. See Cramer, *supra* note 62, at 149 (stating cost of videotape); Singer, *supra* note 56, at 302 n.69 (claiming low price may still be too high for most choreographers). The cost of a video recording can vary greatly. See *id.* If the choreographer purchases his or her own equipment, it could cost about twelve hundred dollars per set, plus the costs of tapes, which average around fifteen dollars each. See *id.* For a better picture, the choreographer can hire a professional who might

the recording process is quick, reconstructing a ballet from film is often inaccurate and slow.¹³³

Video recordings often fail to capture the choreographer's actual intent, since a film version of the work significantly depends on the skill and accuracy of the dancer.¹³⁴ A number of elements can go wrong: a dancer may miss a step, execute the movement at a different angle, miss the rhythm or beat of the music, or fail to capture an emotion.¹³⁵ Furthermore, reconstructing a ballet from film is laborious because even a skilled observer has difficulty discerning the various movements on stage.¹³⁶ Specifically, the person watching the video might have difficulty discerning where the dancers are on stage, depending on the angle of the recording.¹³⁷

As film once promised a solution to the fixation problem, computer technology now promises to be an inexpensive and accurate method of recording movement. Merce Cunningham was one of the first major choreographers to use computer technology to record their works.¹³⁸ Using a computer program that allows the user

cost about seventy dollars to one hundred dollars per hour of dancing taped, plus editing time. *See id.*

133. *See Singer, supra* note 56, at 303 (describing process of decoding films to reconstruct choreographic works). Unlike dance notation, film captures style but fails in other respects. *See id.* First, isolated movements are not clear on film because films capture live performances. *See id.* Second, it is difficult to understand three-dimensional questions of space. *See id.* Finally, to reconstruct what is on the film, the choreographer has to transpose the movement because the film is taken from the perspective of the audience, not the dancers. *See id.*

134. *See id.* at 302-03 (comparing reconstruction of ballet from video recordings and reconstruction of symphonies from audio recordings).

135. *See Cramer, supra* note 62, at 149-50 (noting potential difficulty in reconstructing ballet from film). "[C]ertain things cannot easily be shown, such as precise balance points or degrees of muscular tension which are essential in certain intricate sequences, especially those emphasizing feats of partnering." *Id.* at 150. According to Peter Martins, Ballet Master of New York City Ballet, film reproductions are difficult because "there is no space in television. When you make a dance for the stage, you work with a straight line, a circle, a semicircle, a diagonal. There are the options. On television, these options become totally distorted." *Singer, supra* note 56, at 303 n.72.

136. *See Cramer, supra* note 62, at 150 (finding it "difficult to conceive of the amount of squinting needed to make sense out of a film with such diverse activity").

137. *See id.* Sometimes the best angle for recording the movement is not the best angle to reconstruct the movement because the person watching the video cannot see where the dancer is standing on stage. *See Singer, supra* note 56, at 303. For example, a close-up on a specific dancer might be the best way to see the exact movement, but the viewer will be unable to see where the other dancers are on stage. Conversely, a wide-angle shot might be best for viewing where all the dancers are on stage, but it will be difficult to see the exact movements.

138. *See Cramer, supra* note 62, at 150-51 (describing Cunningham's use of computer programs).

to manipulate three-dimensional figures, Cunningham was able to fix movements exactly as he wanted them performed.¹³⁹ The program provides three-dimensional views from every angle, helping dancers learn and understand the movement free of human error.¹⁴⁰ Despite its promise, these programs are not widely available to all choreographers at present. Even if they became widely available, many choreographers would not use the programs because they cannot express the fundamental choreographic element of emotion.

2. *Protections Under Dance Community Customs*

Because dance has not reached the popular status of other art forms, fewer artists choose to pursue it as a career.¹⁴¹ As a result, the dance community is close-knit, protective, and aware of smaller companies and financially dependent choreographers.¹⁴² In this community, dancers and choreographers abide by unwritten customs to protect their own works and the works of others.¹⁴³ Choreographers are often the most well-respected members of the dance community and, therefore, their works are zealously protected.¹⁴⁴

139. *See id.* Specifically, Cunningham stated, “[p]reviously, I would make notes myself, as explicit as I could, but that’s not the same thing as having this figure do the movement, you see.” *Id.*

140. *See id.* at 150 (describing functions of computer program).

141. *See Singer, supra* note 56, at 291 (stating dance has second-class status when compared to drama or music); *see also* KRAUS, *supra* note 13, at 360 (finding expectation of employment in dance is “likely to be illusory”). Audiences are often scarce for dance performances. *See Singer, supra* note 56, at 291. Furthermore, even companies who attract large audiences still face insurmountable production costs and cannot economically justify many performances. *See id.* As a result of the depleted funds, choreographers and dancers are often underpaid. *See id.* Further, finding stable employment in dance is difficult because there are a limited number of positions and an intense level of competition. *See KRAUS, supra* note 13, at 360. *But see* FONTEYNE, *supra* note 1, at 13-22 (explaining evolution of dance in United States and Russia). The industrial revolution had an important impact on dance in America, while the former U.S.S.R. remained virtually unaffected. *See id.* at 16. Because the Russian way of life remained rural, folk dance, a style in which male dancers excel, continued to have an impact on people. *See id.* Dance exploded as a popular art form in America when male dancers like Rudolf Nureyev, Mikhail Baryshnikov, and Fred Astaire took the stage. *See id.* Also, movies like *The Turning Point*, *Saturday Night Fever*, and *The Red Shoes* popularized dance. *See id.*

142. *See Singer, supra* note 56, at 291 n.18 (asserting dance companies are often located in New York City); *see also* TERRY, *supra* note 10, at 10-11 (describing New York City ballet scene and birth of dance in other cities like Philadelphia, Chicago, and San Francisco).

143. *See Singer, supra* note 56, at 291-92 (stating environment creates and enforces customs unique to dance community).

144. *See id.* at 292 (claiming customary protection extends through all stages of creation process); *see also* CRISP & CLARKE, *supra* note 40, at 25-26 (noting difficulty in explaining creation process and examples of choreographers’ processes).

Choreographic credit is awarded to a work the moment a choreographer “releases” it.¹⁴⁵ A choreographer “releases” his or her work the first time the work is publicly performed.¹⁴⁶ Furthermore, credit is awarded regardless of whether the choreographer created the work for a person or a company that legally owned the rights to the creation.¹⁴⁷ For example, if George Balanchine created a work for the American Ballet Theatre, credit for that work is awarded to Balanchine.

Once a choreographer is credited with having created the work, he or she retains control over the work.¹⁴⁸ If another company wishes to perform a choreographer’s work, representatives of that company will customarily consult with the original choreographer first.¹⁴⁹ The original choreographer will visit the dance company interested in performing the work and assess the capabilities of that company’s dancers.¹⁵⁰ If the choreographer is satisfied with the company, he or she will tentatively allow it to perform his work.¹⁵¹ Nevertheless, as an extra precaution, the choreographer and potential company customarily enter into a licensing agreement before rehearsals commence.¹⁵²

145. See Singer, *supra* note 56, at 292-94 (claiming choreographic credit attached when work is performed). *But see* MINTON, *supra* note 39, at 2 (suggesting choreographers considered creators at early stages in creation process).

146. See Singer, *supra* note 56, at 292-93. *But see* Swack, *supra* note 105, at 279-80 (explaining creation for copyright purposes begins when work becomes fixed in tangible medium). Section 106 of the Copyright Act states, “a [choreographic] work is ‘created’ when it is fixed in a copy . . . for the first time.” *Id.*

147. See Singer, *supra* note 56, at 293-94 (explaining dance community’s attitude once choreography is performed). Singer suggests choreographers working freelance for other companies are understood to be the authors of their works. *See id.* In the dance community, it does not matter that another company owns legal rights to the dance because the choreographer is given credit for his creations. *See id.*

148. *See id.* at 293 (noting dance community’s commitment to ensure choreographic control after release).

149. *See id.* (recounting process of requesting use of choreographic works). This is a practice that most dance companies follow in requesting permission to use a choreographer’s work. *See id.*

150. *See id.* at 293-94 (explaining choreographer’s criteria for deciding whether to allow performance). The choreographer will assess a company’s capability by considering the technical abilities of the individual dancers and the personality of the company. *See id.* at 294.

151. *See id.* (describing requirement that choreographer be “convinced that the skills of the company reflect the artistic worth of the composition”). A choreographer or his representative is free to refuse the company. *See id.*

152. *See* Singer, *supra* note 56, at 294-95 (describing licensing agreement). Even though the dance community would protect the choreographer if the performance was not an adequate depiction of his or her original work, many choreographers prefer the extra protection of licensing agreements. *See id.* at 294. Most licensing agreements include the right of performance. *See id.* Such a license gives

In addition to granting certain rights to the company performing the work, the licensing agreement assures the choreographer that the new company will perform the work with integrity.¹⁵³ In effect, the original choreographer may help teach and rehearse the dancers so they understand all aspects of the work.¹⁵⁴ The choreographer usually retains control over subsequent performances and can prevent all modifications of the work.¹⁵⁵ If at some point the choreographer feels the company is unable to perform the work adequately, the work may be pulled from performance.¹⁵⁶ In the end, licensing agreements preserve artistic rights of choreographers in ways copyright law does not.¹⁵⁷

Customary protections extend long after a choreographer is gone.¹⁵⁸ If the choreographer has passed away, there is a grave risk the work might be lost.¹⁵⁹ In an effort to prevent this, members of the dance community who admire the choreographer's work will pass it down to their dancers through memory.¹⁶⁰ Although mem-

the company the right to perform the work for a specific time or for a specified number of performances. *See id.*

153. *See id.* at 294 (explaining what "artistic integrity" means in choreographic context). Artistic integrity is one of the most important rights a choreographer desires in entering into such a licensing agreement. *See id.* at 295.

154. *See id.* at 294-95 (finding licensing agreement often contains stipulations that allow degree of control by choreographer). A licensing agreement usually includes an express provision that the choreographer or his agent will teach the piece to the dancers. *See id.* Also, the agreement may provide that the choreographer will be on hand to supervise rehearsals including final technical rehearsals. *See id.* at 295. Technical rehearsals will include the final staging rehearsals. *See id.*

155. *See id.* at 295 (claiming choreographer does not lose control over work after first performance). The choreographer customarily is allowed to review the company's performances periodically. *See id.* The company performing the work cannot make any alterations without the choreographer's acquiescence. *See id.*

156. *See id.* (claiming choreographic integrity includes choreographer's right to prohibit subsequent performances that do not reflect original choreography). In allowing the choreographer to end future performances, the agreement reflects a concern for artistic integrity. *See id.* at 294.

157. *See Singer, supra* note 56, at 294-95 (explaining artistic integrity primary importance for choreographers). "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." *Id.* at 295.

158. *See generally* BALANCHINE & MASON, *supra* note 1 (listing original choreographers of many classical works).

159. *See* ANDERSON, *supra* note 8, at 1 (lamenting loss of many great choreographic works). "The dances of Anna Pavlova have already been buried with her." *Id.* at 9-10.

160. *See, e.g.,* ANDERSON, *supra* note 8, at 1 ("Usually dances are preserved — if they are preserved at all — only in the memory of the artists who perform them."). They are passed down by memory because many choreographers and dance historians think an "effective, serviceable notation, able to render the many faces of dance, has yet to be created and made universally applicable." *Id.* at 9.

ory is fallible and many important works have been lost through the years, it is generally regarded that no adequate method of notation has been developed to date.¹⁶¹ Customarily, companies rigorously rehearse these works in an effort to preserve the original choreographer's artistic integrity.

B. Enforcing Protections

1. *Enforcing Copyright Protections*

If choreographers choose to enforce their rights under copyright law, the Act requires them to prove substantial similarity — a test that poses difficult problems in the dance community.¹⁶² The Supreme Court has not yet articulated this test for choreographic works.¹⁶³ The circuit courts provide some guidance.¹⁶⁴ If choreographers with lesser funds feel the test for judging copyright infringement is ambiguous, they may not enforce their copyright protection.¹⁶⁵ To avoid the financial burden of litigation, many choreographers will rely on the community to protect their work.¹⁶⁶

Even if choreographers undertake the formidable task of obtaining copyright protection, they may encounter difficulties in proving infringement.¹⁶⁷ In the only relevant case decided by any court to date, *Horgan v. Macmillan, Inc.*,¹⁶⁸ the Second Circuit found the proper standard for adjudicating claims of copyright in-

161. See *id.* at 9 (stating no method of fixation is entirely effective). See generally TERRY, *supra* note 10, at 241 (listing number of times *Pas de Quatre* was performed since original performance in 1845). One example of a ballet that has been performed as close to the original as possible is *Pas de Quatre*. See *id.* Originally choreographed by Jules Perrot in 1945, it has subsequently been restaged several times. See *id.* There is no record of the original choreography. See *id.* at 242. Today, historians and choreographers look to lithographs for costumes, positions, and even some of the steps originally used. See *id.* Popular lore about the original choreography is reflected in modern versions of the work. See *id.* For example, "a hint of malice and of rivalry are present as they must surely have been in the original presentations. Everything is ladylike, elegant, proper but touches of hauteur suggest that each believes herself to be unique." *Id.* at 243.

162. For a discussion of the dance community's particularities, see *infra* notes 178-90 and accompanying text.

163. For a discussion of the only decision about choreographic copyright infringement, see *infra* notes 168-77 and accompanying text.

164. For a discussion of the Second Circuit's definition of substantial similarity, see *infra* notes 175-77.

165. For a discussion of the shortcomings of the substantial similarity test, see *infra* notes 178-90 and accompanying text.

166. For a discussion of community pressures, see *infra* notes 191-95 and accompanying text.

167. For a discussion of the difficulty in proving infringement, see *infra* notes 168-90 and accompanying text.

168. 789 F.2d 157 (2d Cir. 1986).

fringement is substantial similarity.¹⁶⁹ The Second Circuit articulated that standard to be whether the ordinary observer viewing the two works would be disposed to overlook their disparities and perceive their aesthetic appeal as essentially the same.¹⁷⁰

In *Horgan*, the trial court was asked to determine whether photographs of Balanchine's *The Nutcracker* infringed on his copyright of that work.¹⁷¹ The trial court held the still photographs lacked movement, the essential element of a choreographic work.¹⁷² Furthermore, the trial court reasoned movement could not be recreated from the photographs.¹⁷³ Thus, the trial court determined the still photographs did not infringe on Balanchine's copyrighted work.¹⁷⁴

The Second Circuit found the trial court's emphasis on recreation was inappropriate and instead applied the substantial similarity test.¹⁷⁵ The court concluded even a snapshot could be substantially

169. See *id.* at 162 (applying substantial similarity test); see also Gennerich, *supra* note 59, at 388 (noting use of substantial similarity test); Hilgard, *supra* note 59, at 771-72 (explaining Second Circuit's determination); Cramer, *supra* note 62, at 152-53 (discussing appellate court's test). In *Horgan*, Macmillan published photographs of Balanchine's, *The Nutcracker*, despite his copyright. See Gennerich, *supra* note 59, at 384. Horgan, executrix of Balanchine's estate, objected to use of the photographs in the book and brought suit, seeking preliminary and permanent injunctions and a temporary restraining order, and claiming the photographs were an "unauthorized presentation" of Balanchine's ballet. See *id.* at 384-85; see also *Horgan*, 789 F.2d at 159. This is the only known case brought for choreographic copyright infringement thus far, and it was brought by a large, financially stable estate.

170. See *Horgan*, 789 F.2d at 162 (enunciating test); see also Gennerich, *supra* note 59, at 388 (citing substantial similarity test used in *Horgan*); Hilgard, *supra* note 59, at 771-73 (explaining substantial similarity test). The court has used substantial similarity in many other contexts, but it has yet to come up with a single test reflecting this standard. See *id.* at 771-73. Moreover, the courts have not consistently applied the standard. See *id.* at 771-72. The substantial similarity test will presumably be used in future choreography cases. See *id.* at 772-75.

171. See *Horgan*, 789 F.2d at 158-60 (listing claims before court). The court sought to enjoin publication based on § 106 of the Copyright Act, which gives the owner of a copyright the exclusive right to prepare derivative works of the copyrighted work. See *id.*

172. See *Horgan v. Macmillan, Inc.*, 621 F. Supp. 1169, 1170 (D.C.N.Y. 1985) (describing choreography as "the flow of steps in a ballet"); see also Gennerich, *supra* note 59, at 386-87 (explaining district court findings); Hilgard, *supra* note 59, at 770 (explaining same).

173. See *Horgan*, 621 F. Supp. at 1170 n.1 (finding movement could not be recreated from single moment). Judge Owen analogized this situation to the impossible task of "recreating Beethoven's Fifth Symphony from a document containing only every twenty-fifth chord." See *id.*

174. See *id.* (discussing holding).

175. See *Horgan*, 789 F.2d at 162 (stating substantial similarity was proper test); see also Gennerich, *supra* note 59, at 388 (noting appellate court's judgment that trial court applied improper test); Hilgard, *supra* note 59, at 771 (claiming use of improper test was basis for remand by appellate court).

similar to the ballet, even if only constituting one moment, if it was qualitatively similar to the overall ballet.¹⁷⁶ The case was remanded to determine whether the photographs were substantially similar to the overall choreographic work, but the case was eventually settled out of court.¹⁷⁷

Although *Horgan* could have set an important precedent for choreographers, the Second Circuit's substantial similarity test, absent application of the test on remand, provided little guidance for choreographers seeking enforcement of their copyrights.¹⁷⁸ A company with a small budget can justify litigation only if it has a clear test to follow.¹⁷⁹ The substantial similarity test is unclear for two reasons: first, it is based on the ordinary observer's judgment of overall similarity;¹⁸⁰ and second, the test equates insignificant borrowing with full-blown infringement.¹⁸¹

In requiring the ordinary observer to make judgments on substantial similarity based on overall aesthetic appeal, the court may

176. See *Horgan*, 789 F.2d at 163 (criticizing trial court's inadequate treatment of threat posed by photographs); see also Gennerich, *supra* note 59, at 388 (stating appellate court's conclusion that a photograph could communicate more than a mere gesture or position); Hilgard, *supra* note 59, at 772-73 (emphasizing qualitative similarity over quantitative similarity of photographs). The appellate court found "a snapshot of a single moment in a dance sequence may communicate a great deal." *Horgan*, 789 F.2d at 163.

177. See *Horgan*, 789 F.2d at 162-63 (enumerating issues remanded for trial court determination). The Second Circuit remanded the case for determinations as to (1) how much of Balanchine's production arose in the public domain; (2) whether enough photographs were included in the book to constitute infringement; and (3) whether the doctrine of fair use applied as a defense to copyright infringement. See *id.*

178. See Hilgard, *supra* note 59, at 781-83 (positing substantial similarity test is inappropriate for judging choreographic works). In addition, Hilgard believes the court in *Horgan* improperly dismissed the opportunity to define choreography. See *id.* at 775-81. The *Horgan* court advanced two theories about choreography — both inadequate — but it never explicitly defined it. See *id.* First, the court used the "static-elements" theory, which said a photograph captured choreography by recording "sufficient elements" of it, such as space and shape. See *id.* at 776. This theory fails to acknowledge other essential elements like rhythm, movement, and timing. See *id.* at 778. The theory also glorifies the importance of simple building blocks, which, like a writer's words, are not copyrightable by themselves. See *id.* at 777. Second, the court used the "surrounding moments" theory, claiming the photograph could elicit a visual perception of the movement just before and after the photograph was taken. See *id.* at 779 n.177. This view is also inadequate because, like musical chords taken in isolation, a moment caught by a photographer's lens does not adequately capture the choreographer's expression. See *id.* at 781.

179. See *id.* at 783.

180. See *id.* at 782 (stating substantial similarity test puts excessive emphasis on overall look and feel, failing to clarify particular protected elements).

181. See *id.* at 783 ("The second shortcoming of the substantial similarity test is that it suggests that even small takings can constitute infringement.").

potentially invite observers to falsely conclude that dissimilar works are actually substantially similar.¹⁸² A live dance production may include many aspects that are not under the direct control of the choreographer.¹⁸³ Therefore, asking observers to base their decision on overall aesthetics requires judgment of lighting, costuming, and set design in that particular show.¹⁸⁴ Those elements, which are beyond the choreographer's control, should not determine whether one choreographic work is regarded as substantially similar to another.¹⁸⁵

Second, the court's articulation of the substantial similarity test is inadequate because it would allow insignificant borrowing to constitute infringement.¹⁸⁶ The Second Circuit held qualitatively similar snapshots could theoretically infringe on the choreographer's copyright.¹⁸⁷ Since a court has yet to determine which combination of snapshots amounts to overall infringement, allowing a small amount of borrowing is problematic for most choreographers.¹⁸⁸ Dance has a long tradition of borrowing and expanding upon movement; therefore, allowing protection for mere moments in an overall work leaves many new choreographers open to lawsuits.¹⁸⁹ The test may be so strict that future choreographers may be cre-

182. *See id.* at 782 n.200 (noting ordinary observer would ultimately make such determinations).

183. *See* Hilgard, *supra* note 59, at 783 (enumerating other aspects possibly included in dance production, such as lighting, costumes, and sets). The choreographer may make decisions about lighting, costuming, and set designs; however, in many companies, lighting directors, costume designers, and set designers would create these elements. *See* CRISP & CLARKE, *supra* note 40, at 25. For example, Diaghilev often commissioned visual artists ranging from Picasso to Matisse to work on his set designs. *See* ANDERSON, *supra* note 8, at 121.

184. *See* Hilgard, *supra* note 59, at 783 (pointing to potential injustice in applying these elements to choreographer's work).

185. *See id.* at 782 (concluding "overall aesthetic appeal" requirement is unsatisfactory). Not only are aspects, such as lighting, costumes, and set design, beyond the choreographer's control, but they are also copyrightable in their own right. *See id.* at 782 n.199. There is no reason, therefore, to include them as part of the "substantial similarity" test. *See id.* at 782-83.

186. *See id.* at 783 (explaining second "shortcoming" of substantial similarity test as allowing small takings to be considered infringement).

187. *See id.* (noting if small portions of defendant's work are substantially similar, the work may infringe on copyright).

188. *See id.* (concluding lack of clarity in substantial similarity test exacerbated by lack of definition in opinion).

189. *See* Hilgard, *supra* note 59, at 783-84. The appellate court's failure to further explicate the substantial similarity test will adversely affect a choreographer's desire to obtain copyright protection. *See id.* at 783.

actively stifled for fear of infringing on an unknown choreographer's work.¹⁹⁰

2. *Enforcing Customs*

Licensing agreements are widely used and rarely breached by small choreographers and dance companies.¹⁹¹ When breach does occur, it is usually because licensees are not familiar with dance community standards and choreographers are in unfair bargaining positions.¹⁹² Even if a breach does occur, choreographers are reluctant to seek legal remedies.¹⁹³ Customarily, choreographers enforce licensing agreements by peer pressure and community standards and, thus, do not seek legal enforcement of their claims.¹⁹⁴ Generally, a breaching choreographer's marred reputation is punishment enough.¹⁹⁵

IV. REMEDIES FOR BREACH

A. Copyright Infringement Remedies

Although a choreographer's primary concern is preserving creative rights in a work of art, the Copyright Act protects only economic rights.¹⁹⁶ Most choreographers' concerns stem from the

190. *See id.* at 784 (finding law should not be so rigid as to stifle creativity that copyright law is intended to foster).

191. *See Singer, supra* note 56, at 295 (concluding customary attitude toward licensing agreements is positive). Choreographers and companies consider such agreements to be efficient and fair. *See id.*

192. *See id.* at 296 (claiming most breaches result of licensees outside dance world breaching or refusing to honor customary wishes of choreographers). Licensees outside the dance world may not feel constrained to agree to certain requirements that choreographers usually demand to ensure artistic integrity. *See id.* Furthermore, even if they do agree to a choreographer's demands, people outside the dance community will not feel additional community pressure to honor agreements. *See id.*

193. *See id.* (listing several reasons legal remedies do not entice choreographers). First, choreographers regard unwarranted copying as typical in the industry. *See id.* Second, peer pressure is often far more coercive than legal action in the dance world. *See id.* Third, litigation costs are unjustifiable for most small choreographers. *See id.* Fourth, the damage award may not outweigh the costs of taking such action. *See id.* Finally, because the choreographer was probably in a lesser bargaining position than the company, the licensing agreement might not offer him much relief. *See id.*

194. *See id.* (explaining strength of community sanction and risk of trade theories are stronger than legal remedies).

195. *See id.* at 296 n.36 (claiming ostracism effective deterrent for members of dance community).

196. *See Cramer, supra* note 62, at 155 (describing choreographic community's concern with artistic integrity); *Singer, supra* note 56, at 307 (explaining Copyright Act protects only economic rights); *Frazier, supra* note 79, at 315-16

idea that moral rights are principal.¹⁹⁷ Moral rights have their basis in the concept of *droit moral*, or the theory that artists have the right to have their work attributed to them in the form in which it was created.¹⁹⁸ This reflects many choreographers' desires to protect their reputation by preventing distorted performances of their work.¹⁹⁹

Choreographers want to see their work preserved and are often unconcerned with subsequent performances of their work unless those performances are improperly executed.²⁰⁰ Unknown choreographers often view appropriately executed performances of their work as free publicity.²⁰¹ Additionally, they are often genuinely concerned that without regular performance of their work, the choreographic work might be lost forever.²⁰² Enforcing moral

(stating traditional commentators focus on adequacy of economic concerns instead of moral concerns).

197. See Cramer, *supra* note 62, at 155 (explaining choreographers are unconcerned with economic rights); Singer, *supra* note 56, at 304 (noting performance and derivation are only rights protected by Copyright Act that concern choreographers); Frazier, *supra* note 79, at 316 (proposing artist-centered thinking in Copyright Act to give choreographers right of control after sale). Most choreographers decide not to register their works because of their dissatisfaction with the registration process. See Singer, *supra* note 56, at 304. Nonetheless, those that do register are often disappointed to find the range of remedies inadequate to meet their needs. See *id.* Furthermore, depending on the state, a choreographer might find he has greater rights under state common law. See *id.* at 303-04. State common law may provide additional protections of moral rights. See *id.*

198. See Cramer, *supra* note 62, at 155 (conceptualizing *droit morale* as proper framework for adjudicating choreographic rights); see also Frazier, *supra* note 79, at 316-17 (stating artist-centered thinking is currently creeping into American thought). Some legislation, notably the Visual Artists Rights Act of 1990, the Record Rental Amendment of 1984, and the Computer Software Rental Amendments Act of 1990, as well as the creation of a National Film Registry, reflect a shift toward the recognition of artists' moral rights in other genres. See *id.* at 316.

199. See Cramer, *supra* note 62, at 156 (claiming current protections under Copyright Act do not protect against mutilations); see also Singer, *supra* note 56, at 293 (recognizing artist's desire to control work after its release). While viewing his film restored in color, John Houston said, "I just can not watch anymore . . . please I can't watch anymore." Frazier, *supra* note 79, at 314 (quoting David A. Honicky, *Film Labelling as a Cure for Colorization [and Other Alterations]: A Band-Aid for a Hatchet Job*, 12 CARDOZO ARTS & ENT. L.J. 409, 409 (1994)).

200. See Cramer, *supra* note 62, at 158 (describing attitude of choreographers toward borrowing).

201. See *id.* (claiming choreographers feel unauthorized borrowing is inevitable). Most choreographers view unauthorized copying as a risk of the trade. See *id.* They take precautions to ensure that other companies who perform their work do so with integrity. See *id.* at 156-57. If they authorize another company to perform their work, they make sure that company has the adequate skill level to do so. See *id.* at 156.

202. See *id.* at 158 (finding greater concern is how dances could be saved from oblivion). "Many choreographers feel they learn from each other, because watching other choreography expands their horizons." *Id.* Choreographers are con-

rights would preserve the choreographer's vision while encouraging satisfactory execution of subsequent performances.²⁰³

On the other hand, the Copyright Act gives a copyright holder the exclusive right to reproduce, create derivations, distribute copies, perform publicly, and display the work.²⁰⁴ Of these rights, choreographers are most concerned with performance and derivation rights.²⁰⁵ If an unauthorized performance of a choreographer's original work or derivation of such work occurs, the choreographer may bring an action for injunctive relief or monetary damages.²⁰⁶ Injunctive relief, however, is possible only if the choreographer knew in advance that such a performance was about to occur.²⁰⁷ Monetary damages are equally inadequate because the distorted choreographic work was already publicly performed.²⁰⁸

cerned an overly broad interpretation of the Copyright Act might limit subsequent performances of their work. *See id.*

203. *See id.* at 155 (claiming American law does not include concept of moral rights); *see also* Frazier, *supra* note 79, at 315-16 (citing Houston's work as example of work unprotected by American theory of copyright). French law vindicates an artist's right to control modifications to his work after his death. *See id.* at 315. For example, a French court found subsequent colorization of John Houston's film, *The Asphalt Jungle*, violated his moral rights as an artist. *See id.*

204. *See* Singer, *supra* note 56, at 304 (enumerating rights created for copyright holders) (citing 17 U.S.C. § 106 (Supp. V 1981)). The Supreme Court has stated copyright protection is premised on "the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talent of authors . . ." *Id.* (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)). This philosophy emphasizes economic rights over other rights as a rationale for copyright protection. *See id.*

205. *See id.* at 305-06 (postulating rights of performance and derivation are rights most in line with choreographer's moral concerns). "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), and whether or not for profit." *Id.* In addition, the Act gives the choreographer the exclusive right to control all derivations of the work. *See id.*

206. *See id.* at 305. A derivation of a choreographer's work would include any subsequent recasting, adaptation, revival, or restaging. *See id.* Specifically, any adaptation in another form of dance — for example a ballet revived as a modern piece — is considered a derivative work. *See id.* Such interpretations have become very popular. *See id.* Therefore, it would seem the value of copyright for choreographers would be increased. *See id.* However, choreographers choose not to seek copyrights or enforce copyrights because economic remedies are the only available remedies. *See id.* The Act allows a copyright holder the right to seek only monetary or injunctive relief. *See id.*

207. *See id.* (stating choreographer must be able to act before such unlicensed performance occurs for copyright protection to be valuable).

208. *See id.* (describing inadequacy of monetary damages). If an unauthorized performance occurs, the choreographer may receive monetary damages and injunctive relief to stop all future performances. *See id.* In such a case, monetary damages would be awarded in the amount of lost profits. *See id.* Lost profits are

B. Customary Remedies

Unknown choreographers will often prefer customary remedies because litigation is time consuming and costly.²⁰⁹ Furthermore, since an unknown choreographer's impetus for creating a dance is not usually financial gain, economic remedies afforded by the Copyright Act are inadequate.²¹⁰ The dance community's customs zealously guard the choreographer's moral rights.²¹¹ Community sanction of infringing dance companies provides a strong incentive against borrowing improperly from a choreographer and meets the financial needs of the unknown choreographer.²¹² Additionally, the community is most in tune with what level of borrowing is improper and can react appropriately.

V. POSSIBLE SOLUTIONS: CODIFYING CUSTOMARY PRACTICE

Although elements in the Copyright Act itself are a difficult fit for choreographic works by unknown choreographers, the difficulties are not insurmountable. First, courts should attempt to define choreography.²¹³ Second, the originality requirement should be defined and modified to allow some amount of borrowing.²¹⁴ Third, smaller choreographers would find great relief if legislators would carve out a special exception to the fixation requirement for choreographic works.²¹⁵ Finally, the Copyright Act should recog-

not an adequate measure of what a choreographer has actually lost if such a mutilation occurs, because dance performances rarely yield large profits. *See id.*

209. *See Singer, supra* note 56, at 306 (noting dance community guarantees monetary remedies through enforcement of licensing agreements).

210. *See id.* at 306-07 (explaining economic rights are not important to choreographers). "Because the average choreographer will never reap financial gain from his [or her] creative endeavors, his [or her] creative impetus must stem from other factors: the desire to express or communicate." *Id.* at 306. Therefore, a choreographer's primary concern is not monetary rights but moral rights, or the right to control the expression and communication of the choreographer's message. *See id.* at 307.

211. *See id.* (noting dance community protects moral rights).

212. *See id.* at 296 n.36 (discussing customary constraints on borrowing).

213. For a discussion of the court's failure to define choreography, see *supra* notes 86-104 and accompanying text.

214. For a discussion of the difficulties presented by the originality requirement, see *supra* notes 105-21 and accompanying text.

215. *See Cramer, supra* note 62, at 159-60 (proposing an exception to fixation requirement for choreographic works).

nize, as have courts in other countries, that protections of choreographers' work should include moral rights.²¹⁶

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216. For a discussion of enforcement of moral rights in choreographic works, see *supra* notes 196-212 and accompanying text.