

# A PAS DE DEUX FOR CHOREOGRAPHY AND COPYRIGHT

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*In this Note, Joi Lakes argues that the 1976 Copyright Act and the rules set forth by the Copyright Office are flawed with respect to defining what constitutes expressive, copyrightable material in a choreographic work. This ambiguity creates an imbalance between the public and private domains, which acts to stifle choreographic innovation instead of encouraging it. In particular, the movements comprising choreographic building blocks that properly belong in the public domain are not defined expansively enough. Current copyright doctrine also fails to emphasize the role of flow—or movement through time—in describing choreography's expressive element, which is the sine qua non of copyright protection. Erroneous understandings of choreography's expressive element can result in overprotection of dance works by finding copyright infringement where it does not truly exist. Finally, copyright law's fixation requirement as currently understood could lead to under-protection for choreography, which is particularly difficult to "fix" in a tangible medium. Lakes argues that these imbalances between copyrightable and public domain material in the current Copyright Act can be rectified by amending it both to clarify the definition of a choreographic work and to liberalize the fixation requirement.*

## INTRODUCTION

Fred Astaire and Ginger Rogers. Gregory Hines. Madonna. While many of the United States' most memorable cultural icons have been dancers, our copyright law did not protect the artistic contributions of the creators of their famous moves until the passage of the Copyright Act of 1976<sup>1</sup> (1976 Act), a comprehensive revision of the Copyright Act of 1909. The few choreographers who attempted to gain copyright protection were turned down by the courts,<sup>2</sup> or were expected to gain protection for written descriptions<sup>3</sup> or films<sup>4</sup> of their works, and not for the underlying works themselves. Consequently,

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<sup>1</sup> Copyright Act of 1976, Pub. L. No. 94-553, § 102(a)(4), 90 Stat. 2541, 2544–45 (1976) (current version at 17 U.S.C. § 102(a)(4) (2000)).

<sup>2</sup> See *infra* notes 49, 51–52 and accompanying text.

<sup>3</sup> *Id.*

<sup>4</sup> See *infra* notes 53–54 and accompanying text.

instead of relying on copyright law, choreographers relied on contracts and developed a unique set of community standards which governed copying and unauthorized performances of their works.<sup>5</sup>

These standards were enforceable due to the tight-knit nature of the dance community.<sup>6</sup> Now, however, choreographers operate in a very different world. Congress added choreographic works to the subject matter of copyright in 1976, and thereby ostensibly provided a means by which all choreographers could protect their rights using law instead of custom. This was a necessary step: The dance community has dramatically grown in size,<sup>7</sup> and its new members may be less likely to abide by old community norms. Additionally, dance has never been more commercial. Ventures such as television shows<sup>8</sup> and increasingly popular dance competitions<sup>9</sup> have sparked the interest of corporate players who may be more anxious to obtain and enforce copyright protection than choreographers who came of age before the 1976 Act.<sup>10</sup>

All of these factors are likely to result in increased reliance on the Copyright Act in order to protect choreographic works. Increased reliance will actually benefit the choreographic community. Copyright is engineered to increase innovation by securing economic incentives for creators of new works.<sup>11</sup> However, to encourage innovation, a balance must be struck between allowing creators to copy aspects of preexisting works and protecting the economic value of the work to its originator.

Some commentators have argued that this balance is impossible to strike in an art form such as dance, and thus criticize the inclusion

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<sup>5</sup> For more detail on these community standards, see *infra* notes 18–28 and accompanying text.

<sup>6</sup> *Id.*

<sup>7</sup> See *infra* notes 58–61 and accompanying text.

<sup>8</sup> Fox Broadcasting Company introduced an *American Idol*-style televised dance program called *So You Think You Can Dance* during the summer of 2005. See Virginia Heffernan, *Judges May Tread on Them, but They Still Gotta Dance*, N.Y. TIMES, July 22, 2005, at E5; *So You Think You Can Dance* Official Homepage, <http://fox.com/dance> (last visited Oct. 18, 2005). Wade Robson, the choreographer for N'Sync and other pop acts, was himself so popular that the cable network MTV gave him his own television dance-off program, *The Wade Robson Project*. Mark Sachs, *He Aims to Get Young Talent into the Act*, L.A. TIMES, Sept. 1, 2003, at E16.

<sup>9</sup> While speaking of the growing number of increasingly expensive dance competitions for young students, Tom Ralabate, an associate professor of dance at the University of Buffalo and the National Educational Chairman of Dance Masters of America, stated, “I think the organizers of these competitions are thinking: ‘This is a business.’” Erika Kinetz, *Budding Dancers Compete, Seriously*, N.Y. TIMES, July 7, 2005, at E1.

<sup>10</sup> See *infra* notes 66–67 and accompanying text.

<sup>11</sup> See *infra* Part I.B.1.

of choreography in the Copyright Act.<sup>12</sup> Others argue that the Act overly restricts choreographers and that Congress should waive some of the universal copyright requirements for choreographic works.<sup>13</sup> This Note takes a different approach and argues that copyright protection is in fact appropriate for choreographic works. The difficulty in its application to choreographic works is not that choreography inherently defies copyright protection; rather, the true problem is that the Act itself and the rules set forth by the Copyright Office do not state what constitutes expressive, copyrightable material in a choreographic work. This ambiguity creates an imbalance between the public and private domains, which then stifles innovation instead of encouraging it.

Part I of this Note explores whether copyright law is truly necessary for an artistic community such as that of dance. After looking at the theories behind copyright protection and the changes that have occurred in the choreographic community over the last half century, Part I asserts that copyright protection will be beneficial to the dance community as long as it strikes a balance between what is copyrightable material and what is in the public domain. Part II argues that the Copyright Act does not strike such a balance. Instead, its failure to define choreography in terms of its expressive content creates ambiguity between what is eligible for copyright and what should remain in the public domain. Identifying the choreographer's use of movement and flow as the expressive quality of a choreographic work, this Part shows how the current Act allows courts to grant copyright protection to non-expressive elements of choreographic works and thereby keep those elements outside the public domain. Part III concludes by showing how the requirement that a choreographic work be fixed in tangible form in order to receive copyright protection only exacerbates the Act's problems. Part III argues that the resultant imbalance between copyrightable and public domain material in the current Copyright Act can be rectified by amending it to note specifically what is properly relegated to each domain.

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<sup>12</sup> Professor Barbara Singer, one of the earliest commentators to respond to the 1976 amendment that brought choreography under the Copyright Act, argued that the Act was ineffective because it ignored the actual interests of choreographers. Instead, she urged reliance on the artistic community's customs. Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. the Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 317-19 (1984).

<sup>13</sup> For example, Krystina Lopez de Quintana argues that the Copyright Act's requirement that a work be fixed in tangible form overly restricts choreographers and should be waived. Krystina Lopez de Quintana, Comment, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 158-61, 171 (2004).

## I

DANCING WITHOUT A PARTNER: IS COPYRIGHT REALLY  
ESSENTIAL FOR INNOVATION?

Not all commentators believe copyright protection is essential for innovation.<sup>14</sup> Creative minds produced works of art long before the creation of copyright law and continued to do so even when laws, once enacted, failed to protect their works. The world of dance is a prime example—it did not receive copyright protection until the twentieth century, and yet it existed and flourished for centuries before that. In fact, dance had one of its largest growth spurts beginning in the 1960s, prior to its explicit protection under the Copyright Act.<sup>15</sup> However, as this Part will argue, statutory copyright protection provides benefits that a self-regulated industry cannot.

This Part provides historical background on the dance industry's relationship with self-regulation and copyright protection. It also introduces the concepts of the public domain and proprietary rights of copyright owners, and how these two spheres are interrelated. In conclusion, this Part asserts that a balance between these two spheres is necessary for copyright to serve its purpose of encouraging innovation among choreographers.

#### A. *The Public Domain and Choreography's "Culture of Sharing"*

##### 1. *Dancing Together Without Copyright*

Prior to the 1976 Act, the world of dance was generally unprotected by copyright, other than a small number of works by powerful choreographers such as Hanya Holm<sup>16</sup> and George Balanchine.<sup>17</sup> Choreographers worried primarily about gaining the copyrights to musical scores, not to the works of their peers.<sup>18</sup> In the absence of copyright protection, choreographers had to devise other ways to reap economic value from their works. Over time, custom and contract

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<sup>14</sup> See *infra* note 44.

<sup>15</sup> Douglas C. Sonntag, *Foreword* to THOMAS M. SMITH, NAT'L ENDOWMENT FOR THE ARTS, RAISING THE BARRE: THE GEOGRAPHIC, FINANCIAL, AND ECONOMIC TRENDS OF NONPROFIT DANCE COMPANIES 1, 3 (Bonnie Nichols ed., 2003), available at <http://www.arts.gov/pub/RaisingtheBarre.pdf> (describing "dance boom" from mid-1960s through mid-1980s, characterized by rapid expansion of ballet and modern dance companies).

<sup>16</sup> See *infra* note 51.

<sup>17</sup> See *infra* note 53.

<sup>18</sup> For example, a 1961 article in *Dance Magazine* urged choreographers to clear copyrights on background music for dance performances. Barbara L. Meyer, *The Copyright Question: Some Words to the Wise*, DANCE MAG., Apr. 1961, at 44, 60–61. The article also suggested making sure that a choreographic work was not copyrighted by another party, but noted that full copyright protection for choreographic works was still a notion for the future. *Id.* at 45.

became the primary tools for controlling the use and copying of choreographic works, independent of federal copyright protection.

Dancers traditionally relied on memory to preserve and transmit choreographic works.<sup>19</sup> Few had written methods for recording their works. As choreography was rarely written down, it could only be copied by someone who had either been taught the choreography or managed to retain it through observation. Most choreographers were therefore able to prevent copying through “personal control of the dancers.”<sup>20</sup> Further, the dance community discouraged copying by condemning unauthorized performances or plagiarism of choreographic works.<sup>21</sup>

In addition, choreographers usually contracted with licensing parties for the right to control the licensee’s staging of their work.<sup>22</sup> For example, the name of the choreographer was attached to all performances of the work, regardless of the identity of the commissioning party.<sup>23</sup> Choreographers with strong bargaining power were able to use this right of artistic control to halt performances which failed to meet their standards.<sup>24</sup>

These customs and contracts allowed for flexible enforcement of norms in a community that understood dance and its peculiarities. However, community norms were an imperfect means for control. Most copying likely went undetected or was, at least in some cases, condoned. Choreographers may have borrowed from one another’s works because they believed that copying only a portion of a choreographic work was not illegal, or because they believed they would elude detection.<sup>25</sup> Many choreographers possessed a more relaxed view on borrowing from each other’s works, which resulted in what might be termed a “culture of sharing.” Some tolerated copying because it afforded them the opportunity to learn from the works of

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<sup>19</sup> Martha M. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 NEW ENG. L. REV. 227, 238 (1980).

<sup>20</sup> *Id.* at 237; see also Singer, *supra* note 12, at 291–95.

<sup>21</sup> Singer, *supra* note 12, at 291–92, 295–96.

<sup>22</sup> *Id.* at 293–95. Despite changes in copyright law, this is still done. For example, when choreographer Twyla Tharp licenses a ballet company to perform one of her copyrighted works, she chooses a ballet master who ensures the dancers perform the dance consistently with Tharp’s choreography. E-mail from Ginger Montel, Associate Director, Twyla Tharp Productions, to author (Aug. 23, 2004, 13:46 EST) (on file with the *New York University Law Review*).

<sup>23</sup> Singer, *supra* note 12, at 292–93 & n.22.

<sup>24</sup> *Id.* at 295 & n.33, 310 n.107.

<sup>25</sup> See Lucinda Lavelli & Kavita Hosali-Syed, *A Discussion of Plagiarism and Copyright in Relation to Dance*, 4 IMPULSE 65, 66, 69 (1996).

their peers.<sup>26</sup> Still others considered it inevitable, or even viewed it positively as a form of free advertising.<sup>27</sup> Some even argued against copyright protection on the premise that copying among choreographers was, in fact, desirable: Lincoln Kirstein, former head of the New York City Ballet and the School of American Ballet,<sup>28</sup> opposed extending any copyright protection to choreographic works because of the need to allow choreographers to recombine old works into new.<sup>29</sup>

## 2. *Free for You and Me—The Public Domain*

This “culture of sharing” was not unique to choreographers. While we may cling to a romantic myth that artists create in a vacuum, Professor Jessica Litman calls this misconception a “charming notion.”<sup>30</sup> Litman asserts that all authors—be they playwrights, architects, software writers, or choreographers—create so-called “new” works by adapting and recombining preexisting material into a different form.<sup>31</sup> In order to do this in a regime where copyright governs ownership of artistic materials, however, a public domain must exist.

The public domain is frequently defined in “negative” terms as whatever is left outside of the realm of copyrightable material.<sup>32</sup> Generally, this means that public domain materials are those which are free to be shared and utilized by all.<sup>33</sup> Specifically, the contents of the public domain are defined both by statute and by statutory silence—whatever the Copyright Act states is in the public domain, is, and that to which it does not explicitly grant copyright protection remains in the public domain as well.

The Copyright Act affirmatively denies copyright protection to certain aspects of copyrightable works, including “idea[s], . . . con-

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<sup>26</sup> See Lauren B. Cramer, Note, *Copyright Protection for Choreography: Can It Ever Be “En Pointe”?*, 1 SYRACUSE J. LEGIS. & POL’Y 145, 158 (1995).

<sup>27</sup> *Id.*

<sup>28</sup> New York City Ballet, About NYCB: Lincoln Kirstein, <http://www.nycballet.com/about/nycblkbio.html> (last visited Sept. 30, 2005).

<sup>29</sup> STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES 113 (Comm. Print 1961) [hereinafter COPYRIGHT REVISION STUDIES] (comments by Lincoln Kirstein) (“Nothing can prevent dancers or observers from taking parts of these works and recombinining them into new works.”).

<sup>30</sup> Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 965 (1990).

<sup>31</sup> *Id.* at 966–67.

<sup>32</sup> See, e.g., James Boyle, *Foreword: The Opposite of Property*, 66 LAW & CONTEMP. PROBS. 1, 30 (2003) (“The term ‘public domain’ is generally used to refer to material that is unprotected by intellectual property rights . . .”); Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC’Y 137, 137–38 (1993) (“Is [the public domain] the mere ‘background,’ the ‘negative’ of whatever may be protected?”).

<sup>33</sup> L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC’Y 365, 368 (2000) (“[M]aterial in the public domain . . . remains available for anyone to use for any purpose.”).

cept[s], principle[s], or discover[ies] . . . ."<sup>34</sup> These elements, which we can view as the building blocks of copyrighted works, can be used by all to create and develop new works. The Act further denies copyright protection to "useful articles" if their "intrinsic" function is utility instead of ornament.<sup>35</sup>

After protected works pass the period of statutory protection, which is limited by the Copyright Act to the life of the author plus seventy years for most copyrighted works,<sup>36</sup> they enter the public domain. The Act implies that other categories of works, such as those works which are not included in the eight broad subject matters of copyright, do not receive copyright protection.<sup>37</sup> These categories of creative materials are therefore available for unlimited use by anyone who wishes to create new works. This was the case for the vast majority of choreographic works prior to the 1976 Copyright Act. The resulting system afforded no true property rights in choreographic works. Since choreographers had no legal recourse against unauthorized copying, the financial worth of their dance works was limited by the possibility of a breach of community custom.

Not all choreographers appreciated the freedoms which their customs provided. Some found the rights granted by statutory copyright protection to be preferable and began to seek it as early as the 1860s.<sup>38</sup> The next section addresses the economic benefits of copyright protection to choreographers, and their attempts to obtain protection.

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<sup>34</sup> 17 U.S.C. § 102(b) (2000).

<sup>35</sup> 17 U.S.C. §§ 101, 102(a)(5) (2000) (defining "useful article" and "pictorial, graphic, and sculptural works" as well as listing subject matter of copyright).

<sup>36</sup> 17 U.S.C. § 302(a) (2000). For anonymous works, pseudonymous works, or works made for hire, the current copyright term is either 95 years from first publication, or 120 years from the year of creation, whichever expires first. 17 U.S.C. § 302(c) (2000).

<sup>37</sup> The eight subject matters which copyright currently covers include literary works; musical works; dramatic works; pantomimes and choreography; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. 17 U.S.C. § 102(a)(1)-(8) (2000). While the subject matter of copyright has been greatly expanded since the early days of copyright protection, some creative works are still excluded. For example, some commentators argue that certain athletic routines should be copyrightable, and have attempted to gain this copyright protection by claiming they fall under the category of choreography. See Wm. Tucker Griffith, Comment, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 681-82 (1998).

<sup>38</sup> Martinetti v. Maguire, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9173) (denying early attempt to protect play, including its choreography, as dramatic composition).

## B. Moving from Custom to Copyright

### 1. Exclusive Rights: A Reason to Seek Copyright

Copyright law grants the author of a copyrighted work<sup>39</sup> the exclusive right to certain uses of his work.<sup>40</sup> This approach is grounded in a historical desire to provide incentives to authors to continue producing creative and innovative works. The first copyright statute, England's Statute of Anne, enacted in 1710, granted exclusive printing rights to the authors of new literary works "for the Encouragement of Learned Men to Compose and Write,"<sup>41</sup> thus establishing an economic incentive to create. Article I of the United States Constitution echoes this motivation, empowering Congress 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."<sup>42</sup>

Under modern copyright law, these exclusive rights include the right to make copies of the work, to prepare derivative works based on the copyrighted work, to distribute copies of the work to the public, to perform the work publicly, and to display the work publicly.<sup>43</sup> These rights are granted on the premise that property rights are necessary to ensure innovation.<sup>44</sup> The exclusive rights thus provide incentives, primarily financial, to creators of expressive works.<sup>45</sup>

Without the right to control the reproduction and distribution of a work, an author would have fewer incentives to create because it would be more difficult to reap financial gain from his creativity.<sup>46</sup> It would therefore be difficult to cover the costs of innovation, which would possibly prevent him from further innovat-

<sup>39</sup> See *supra* note 37 for listing of subject matter.

<sup>40</sup> See *infra* note 43 and accompanying text.

<sup>41</sup> Statute of Anne, 1710, 8 Ann., c. 18 (Eng.), available at <http://www.copyrighthistory.com/anne.html>.

<sup>42</sup> U.S. CONST. art I, § 8, cl. 8.

<sup>43</sup> 17 U.S.C. § 106 (1)–(6) (2000).

<sup>44</sup> See Litman, *supra* note 30, at 970 (discussing proposition that copyright was put in place for purpose of encouraging authorship). But see Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1331 (2004) (discussing proposition that public domain is necessary for innovation).

<sup>45</sup> See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); *Gilliam v. Am. Broad. Co.*, 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written . . . seeks to vindicate the economic, rather than the personal, rights of authors."); *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) ("The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts.").

<sup>46</sup> Litman, *supra* note 30, at 970.

ing.<sup>47</sup> Those who protect their works via copyright seek the economic benefits which the Copyright Act is intended to provide.<sup>48</sup>

## 2. *Desperately Seeking Copyright*

Choreographers were unable to obtain copyright protection for their works prior to the twentieth century, primarily because dance was largely seen as morally inappropriate and therefore outside of the purview of the “useful arts.”<sup>49</sup> Even after positive changes in the public’s opinion of dance,<sup>50</sup> choreographers were still prevented from obtaining copyright protection as it was outside the statutory subject matter protectable by copyright. Choreographers therefore attempted to copyright choreography as literary materials,<sup>51</sup> but most could not meet these requirements.<sup>52</sup>

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<sup>47</sup> *Id.*; see also Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 506–11 (1945) (“We do not expect that much of the . . . art which we desire can be produced by men who possess independent means or who derive their living from other occupations . . . . So we resort to a monopoly . . . .”).

<sup>48</sup> For example, two musical artists, Metallica and Dr. Dre, sued online file-sharing program Napster for facilitating the distribution of their copyrighted musical works without permission or compensation. Upon settlement of the claim, Napster’s then-CEO, Hank Barry, stated, “[W]e now understand how important it is to Dr. Dre to control how his music is distributed and to be paid for the effort and talent that go into crafting his records.” *Napster Settles Suits*, CNN MONEY, July 12, 2001, <http://money.cnn.com/2001/07/12/news/napster/>.

<sup>49</sup> For example, one dance production, *The Black Crook*, was denied copyright protection because the reviewing court felt the Constitution only entitled Congress to “encourage virtue and discourage immorality” through the copyright law. *Martinetti v. Maguire*, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9173) (describing scene in plaintiff’s ballet as consisting primarily “of women ‘lying about loose’” and therefore unsuitable for public presentation). Thus, for what the court saw as a “grossly indecent” work “calculated to corrupt the morals of the people,” copyright could not apply. *Id.* Ironically, *The Black Crook* was later credited with helping to revitalize American public interest in ballet. PEGGY VAN PRAAGH & PETER BRINSON, THE CHOREOGRAPHIC ART: AN OUTLINE OF ITS PRINCIPLES AND CRAFT 94 (1963).

<sup>50</sup> VAN PRAAGH & BRINSON, *supra* note 49, at 94 (citing changes in public taste as fuel for developments in American dance).

<sup>51</sup> Most choreographers’ attempts to gain protection for their works under the Copyright Act’s protection of literary materials fell short, but these attempts became more successful during the mid-1900s. In 1952, choreographer Hanya Holm’s choreography for the musical *Kiss Me Kate* was granted copyright protection as a dramatic work, despite some ambiguity about whether the choreography itself told a story, which should have been required. See Leon I. Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 810–11 (1952). The next year, detailed written instructions of choreographer Ruth Page’s *Beethoven Sonata* became the first non-dramatic choreographic work to be copyrighted as a book. See Anatole Chujoy, *New Try Made to Copyright Choreography*, DANCE NEWS, Feb. 1953, at 4. However, the Copyright Office warned Page that it expressed no opinion as to whether an unauthorized performance of the choreography would constitute an infringement of the copyrighted book. *Id.*

<sup>52</sup> See *Fuller v. Bemis*, 50 F. 926, 929 (C.C.S.D.N.Y. 1892) (denying copyright protection on grounds that choreographer’s work could “hardly be called dramatic” as “the end

Limiting copyright protection to pieces which qualified as “literary” or “dramatic” works meant that worthy pieces were denied protection on seemingly arbitrary grounds.<sup>53</sup> New forms of abstract and modern dance created by American choreographers, departing from the plot-driven European ballet tradition, remained uncopyrightable.<sup>54</sup> These works thus could not be protected from plagiarism, which may have been condoned in some cases, but was largely unwanted by those seeking copyright protection. Congress and the Copyright Office thus began to rethink the wisdom of granting copyright protection only to choreography that could be classified as a dramatic or literary work, as was the case under the 1909 Copyright Act.

### C. *Keeping en Pointe: The Necessity of a Balanced Property Scheme*

#### 1. *Changing Norms for a Changing Community*

It can be argued that the choreographic community does not need the economic incentives promised by copyright protection in order to progress.<sup>55</sup> In the past, this was so: The dance world grew tremendously, even prior to copyright protection.<sup>56</sup> In a small community, it was possible to have a culture where copying was largely condoned and where property rights were only held by a minority. Professor Barbara Singer asserts that this was the case, at least in the early 1980s, for choreographers who enjoyed a tight-knit community based around New York City.<sup>57</sup> However, the choreographic commu-

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sought for and accomplished was solely the devising of a series of graceful movements . . . telling no story, portraying no character, depicting no emotion"); *Savage v. Hoffmann*, 159 F. 584, 585 (C.C.S.D.N.Y. 1908) (stating that producer of opera had "no literary property in the manner in which [dancers] dance or posture").

<sup>53</sup> For example, some more traditional choreographers, such as George Balanchine, had embraced the plotless ballet as early as the 1930s. *VAN PRAAGH & BRINSON, supra* note 49, at 95–96. In 1953, Balanchine attempted to register an abstract ballet titled *Symphony in C*, but was denied registration by the Copyright Office because his work was not dramatic. Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 272–75 (1999). Balanchine eventually resorted to copyrighting a motion picture of the ballet in 1961 in order to secure protection. *Id.* at 275.

<sup>54</sup> Innovators such as Isadora Duncan and Martha Graham were creating new forms of dance during this period, many of which were plotless embodiments of emotion and ideology. See *VAN PRAAGH & BRINSON, supra* note 49, at 94–95; Jill Sigman, *How Dances Signify: Exemplification, Representation, and Ordinary Movement*, 25 J. PHIL. RES. 489, 493 (2000).

<sup>55</sup> Singer, *supra* note 12, at 318–19 (asserting that choreography can flourish relying on custom).

<sup>56</sup> See *supra* note 15 and accompanying text.

<sup>57</sup> Singer, *supra* note 12, at 291–92.

nity has undergone drastic changes since that time, and these changes dictate a need for copyright protection.

The popularity of dance has skyrocketed in the last few decades.<sup>58</sup> While the size of the domestic dance community was estimated to be approximately 23,000 in 1996,<sup>59</sup> the U.S. Department of Labor's Bureau of Labor Statistics estimated that there were 37,000 such jobs six years later.<sup>60</sup> The Department of Labor further estimated that the job market for choreographers will continue to grow until 2012 in areas including national dance companies, opera companies, school-affiliated groups, television, motion pictures, and music videos.<sup>61</sup>

New members of the dance community will be less likely to follow formerly accepted rules.<sup>62</sup> New technologies, such as inexpensive video recording and digital distribution of video files, have increased the ease of recording dance, but they also have the negative side effect of facilitating difficult-to-detect copying.<sup>63</sup> For example, a dance company that formerly would be forced to license choreography directly from the choreographer may now be able to copy what they see recorded on television or the Internet without ever contacting the choreographer. No longer able to rely on the tight-knit nature of their artistic community for protection of their right to con-

<sup>58</sup> The number of professional, not-for-profit dance companies in the United States rose from 157 in 1975 to as many as 650 by the year 1993. John Munger, *Dancing with Dollars in the Millennium*, DANCE MAG., Apr. 2001, Supplement Insert, at 4. A study by the National Endowment for the Arts reported that the number of nonprofit dance companies in the United States grew by 93% between the years 1987 and 1997. SMITH, *supra* note 15, at 13. These figures do not include choreographers who produce their work for profit, including dances we see on television, in musicals, in fashion shows and various other non-“concert dance” arenas. Commercial choreographers were estimated by choreographer Doris Humphrey in 1959 to be 75% of the choreographic community. DORIS HUMPHREY, THE ART OF MAKING DANCES 28–29 (Barbara Pollack ed., 1987) (counting those employed in “movies, television, shows, plays, operas, pageants, historical productions, commercial ‘spectaculars’ and nightclubs” as 75% of choreographers). It should be noted that the explosion in the number of dance companies occurred *after* legal commentators such as Singer and Traylor declared that the customs of the tightly knit dance community could guarantee the ability of choreographers to control their works. See Traylor, *supra* note 19, at 237; Singer, *supra* note 12, at 291–97.

<sup>59</sup> George T. Silvestri, *Employment Outlook 1996–2006: Occupational Employment Projections to 2006*, MONTHLY LAB. REV., Nov. 1997, at 58, 65 tbl.2, available at <http://www.bls.gov/opub/mlr/1997/11/contents.htm>. Both dancers and choreographers are included in these estimated figures for the size of the dance community.

<sup>60</sup> BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: DANCERS AND CHOREOPHERS (2004), available at <http://www.bls.gov/oco/ocos094.htm>.

<sup>61</sup> *Id.*

<sup>62</sup> Singer, *supra* note 12, at 295–96.

<sup>63</sup> Lavelli & Hosali-Syed, *supra* note 25, at 66–67.

trol the presentation of their works, choreographers must now look elsewhere.

Because of these changes, choreographers likely will turn to copyright protection in increasing numbers. Dance publications<sup>64</sup> and advocacy groups such as Dance/NYC<sup>65</sup> urge choreographers to capitalize on their legal rights. Increased ownership of choreographic works by corporate or nonprofit entities formerly outside the dance community will also lead to increased utilization of copyright law.<sup>66</sup> Corporations may see economic value in the proprietary rights copyright provides, even if choreographers are undereducated about their worth.<sup>67</sup>

## 2. *Increased Reliance Necessitates Copyright Law That Works*

Because granting property rights to choreographers and maintaining the public domain are both so intimately connected with the constitutional goals of progress and innovation within copyrightable subject matter, a balance must be created between the two. Without this balance, innovation will be curtailed. Where the public domain is favored, a community such as the choreographic community described by Professor Singer may evolve.<sup>68</sup> However, in such a situation, the economic incentives to create are tenuous. Further, the marketplace is unregulated, which allows for unequal exploitation of the creative materials at hand.<sup>69</sup>

The opposite prospect is just as dangerous. If all creative materials were eligible for ownership, authors would constantly seek injunctions to stop others from utilizing material which had previously been used by all as a creative base.<sup>70</sup> Transaction costs would drive up the cost of innovation to a point where it would eventually become ineffi-

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<sup>64</sup> See, e.g., Francie Johnson, *Protect Your Choreography: A Guide to Contracts and Copyrights*, DANCE SPIRIT, Dec. 2001, at 42, available at [http://www.dancespirit.com/back\\_issues/dec01/onchoreography.shtml](http://www.dancespirit.com/back_issues/dec01/onchoreography.shtml) (urging choreographers to copyright their choreography and enter written contracts before beginning work).

<sup>65</sup> Dance/NYC's website offers a primer on intellectual property law for choreographers and their managers. See generally DANCE HERITAGE COALITION, INC., A COPYRIGHT PRIMER FOR THE DANCE COMMUNITY (2003), available at [http://www.dancenyc.org/dancers.asp?file=faq&ID\\_Topic=3](http://www.dancenyc.org/dancers.asp?file=faq&ID_Topic=3).

<sup>66</sup> Jennifer Dunning, *Dance and Profit: Who Gets It?*, N.Y. TIMES, Sept. 20, 2003, at B9 ("As dance moves out of studio and into the world of corporate support, such issues [of ownership] have become more urgent.")

<sup>67</sup> For example, a major clothing line attempted to pressure choreographer Brice Vick into signing away the copyright to the choreography he created for their fashion show. Johnson, *supra* note 64.

<sup>68</sup> See *supra* notes 55–56 and accompanying text.

<sup>69</sup> Chander & Sunder, *supra* note 44, at 1340–41.

<sup>70</sup> Litman, *supra* note 30, at 1012, 1015.

cient to create.<sup>71</sup> Thus, we see that in a community too large to be governed by its own customs, and with new economic incentives and corporate players, copyright law is a way to promote innovation and foster progress. However, in order to meet these goals, the law must strike the proper balance and not place too much material outside the public domain. The next Part discusses the current imbalance facing choreographers who seek copyright protection.

## II

### KEEP ON MOVIN': HOW THE COPYRIGHT ACT FAILS TO FOCUS ON THE CHOREOGRAPHER'S EXPRESSION

When Congress granted protection to "choreographic works" in the 1976 Copyright Act, it was silent as to what it intended by the term—possibly because it was unsure of a definition which would cover the intended realm of choreographic works. The Copyright Office and the courts were left to determine what should constitute choreography and what should remain in the public domain, and to determine that balance without direction by Congress. Further, while it can be argued that Congress was correct to be as general as possible in drafting copyright law so that the courts would have flexibility to apply the law to matters of first impression, giving the courts *no* direction in how to apply the law may have led to an application contrary to congressional intent.

This Part argues that Congress's failure to provide definitions with respect to choreography has created a scenario where it is unclear what the term "choreographic work" means. Attempts by the Copyright Office to supply definitions have also fallen short.<sup>72</sup> Like any work that is the subject matter of copyright, a choreographic work for which protection is sought must be an "original work of authorship" and must be "fixed in any tangible medium of expression."<sup>73</sup> However, neither the Copyright Act nor the Copyright Office's regulations clearly specify what constitutes the expressive element of a choreographic work. Since copyright protection only attaches to the expressive elements of copyrighted works,<sup>74</sup> this leaves courts in the dark and allows judges to delegate too much or too little to the public domain.

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<sup>71</sup> *Id.* at 997 (noting economic arguments for and against granting copyright in public domain material such as facts).

<sup>72</sup> See *infra* notes 92–100.

<sup>73</sup> 17 U.S.C. § 102(a) (2000).

<sup>74</sup> See *id.*

### A. Congress Grants Choreographers an Undefined Right

By the late 1950s, the Copyright Office was aware of the 1909 Copyright Act's failure to protect choreographic works.<sup>75</sup> Congress responded to these concerns by identifying the copyright protection of choreography as one of the thirty-five "major substantive issues in copyright revision"<sup>76</sup> and commissioning a report on the inclusion of choreographic works in the Copyright Act.<sup>77</sup>

Due to the presence of this report, it is surprising that Congress was unable to come up with a definition for the term "choreographic work." The report itself, released in 1961, analyzed the positive and negative aspects of granting broader copyright protection to choreography.<sup>78</sup> The respondents to the report represented a range of interests, including legal academics,<sup>79</sup> famed choreographers,<sup>80</sup> publishers of dance notation scores,<sup>81</sup> and dance critics.<sup>82</sup>

Essentially all respondents urged placing choreographic works in a category separate from dramatic works,<sup>83</sup> but the consensus ended there. Some, such as choreographer Anatole Chujoy, disapproved of the denial of protection to "ordinary 'dance routine[s]'," fearing the ambiguity of the term would create minimum standards for copyrightability which would deny protection to great works.<sup>84</sup> Agnes DeMille further opposed separating choreography from social dance steps

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<sup>75</sup> *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 32, 43, 52 (1965) (statement of George D. Cary, Deputy Reg. of Copyrights).

<sup>76</sup> H.R. REP. NO. 94-1476, at 47 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5660 (discussing thirty-five studies of "substantive issues" developed during three years of research).

<sup>77</sup> See generally Borge Varmer, *Study No. 28: Copyright in Choreographic Works*, in COPYRIGHT REVISION STUDIES, *supra* note 29, at 89.

<sup>78</sup> COPYRIGHT REVISION STUDIES, *supra* note 29, at 100–16.

<sup>79</sup> *Id.* at 109 (comments by Walter J. Derenberg). Walter J. Derenberg is both a former New York University School of Law professor and the former Executive Director of the Copyright Society. See COPYRIGHT SOC'Y OF THE USA, ABOUT THE SOCIETY, <http://www.ccsusa.org/html/society/sinfo.htm> (last visited Sept. 30, 2005).

<sup>80</sup> The comments of Agnes George DeMille, COPYRIGHT REVISION STUDIES, *supra* note 29, at 110, Anatole Chujoy, *id.* at 115, Hanya Holm, *id.* at 114, and Lucile B. Nathanson, *id.* at 116, were all printed in part.

<sup>81</sup> *Id.* at 112–13 (comments by Frank C. Barber).

<sup>82</sup> *Id.* at 111–12 (comments by John Martin). John Martin was the first dance critic for the *New York Times*, appointed in 1927. Clive Barnes, *A Tempus Fugit Jubilee—Of Sorts*, DANCE MAG., May 2000, at 106, 106, available at [http://www.findarticles.com/cf\\_dls/m1083/5\\_74/61933438/print.jhtml](http://www.findarticles.com/cf_dls/m1083/5_74/61933438/print.jhtml).

<sup>83</sup> See COPYRIGHT REVISION STUDIES, *supra* note 29, at 110–16 (comments by DeMille, Martin, Holm, Chujoy, and Nathanson supporting a separate category). But see *id.* at 112 (comments by Frank C. Barber) (supporting naming choreographic works in Copyright Act, but opposing creating separate category).

<sup>84</sup> *Id.* at 115 (comments by Anatole Chujoy).

based upon “difficulty, simplicity or familiarity,”<sup>85</sup> expressing a distrust of judges’ ability to determine the “creative original value” of dance.<sup>86</sup> Generally, the responses feared a judicially constructed definition of dance limiting the scope of choreographic works which could be copyrighted.

However, the House Report to the 1976 Act makes it evident that the above-cited responses were largely ignored. Congress fulfilled the respondents’ request to include choreography as a separate category in the subject matter of copyright,<sup>87</sup> but it declined the opportunity to define the term “choreographic works.”<sup>88</sup> Instead, the House Report claimed that the term had a “fairly settled meaning[ ]”<sup>89</sup> and therefore it was unnecessary to specify that “[c]horeographic works” do not include social dance steps and simple routines.<sup>90</sup> The inclusion of choreographic works in the Copyright Act was extremely general, and consisted of the mere statement that “[w]orks of authorship include the following categories: . . . pantomimes and choreographic works.”<sup>91</sup>

The Copyright Office was thus forced to devise a definition of choreography for its regulations. In 1984, *Compendium II of Copyright Office Practices* was released with definitions and regulations pertaining to the copyrightability of choreography.<sup>92</sup> The influence of *Compendium II* is debatable. While it has been stated that the Copyright Office is not to decide issues of first impression,<sup>93</sup> it is clear that courts turn to *Compendium II* when they need instruction in copyright cases.<sup>94</sup> Further, it has been stated that “[t]he Register [of Copyright] has the authority to interpret the copyright laws and . . . its interpretations are entitled to judicial deference if reasonable.”<sup>95</sup> The only federal case to address infringement of a choreographic work,

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<sup>85</sup> *Id.* at 110 (comments by Agnes George DeMille).

<sup>86</sup> *Id.*

<sup>87</sup> H.R. REP. NO. 94-1476, at 53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666-67.

<sup>88</sup> See *id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 53-54, reprinted in 1976 U.S.C.C.A.N. at 5666-67.

<sup>91</sup> 17 U.S.C. § 102(a)(4) (2000).

<sup>92</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450 (1984) [hereinafter COMPENDIUM II].

<sup>93</sup> Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 946-47 (2d Cir. 1975) (“[T]he Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight.” (citations omitted)).

<sup>94</sup> See, e.g., Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775, 779 (9th Cir. 2002) (referencing *Compendium II* for definition of “source code”); Batjac Prods. Inc. v. GoodTimes Home Video Corp., 160 F.3d 1223, 1230 (9th Cir. 1998) (referencing *Compendium II* for instruction as to what constitutes “publication” of film).

<sup>95</sup> Marascalco v. Fantasy, Inc., 953 F.2d 469, 473 (9th Cir. 1991).

*Horgan v. MacMillan, Inc.*,<sup>96</sup> did turn to *Compendium II* for direction on the issue of copyright for choreography<sup>97</sup> and there is little question that the next court to address similar issues will do so as well.

*Compendium II* defined choreography as “the composition and arrangement of dance movements and patterns . . . . Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships.”<sup>98</sup> The regulations also denoted which elements did not pass constitutionally required minimums for originality. Echoing the legislative history, the Copyright Office declared that “[s]ocial dance steps and simple routines” were not copyrightable, including “the basic waltz step, the hustle step, and the second position of classical ballet.”<sup>99</sup> However, the regulation went on to state that these elements could be copyrightable if they were incorporated into an “otherwise registrable choreographic work” and “may be utilized as the choreographer’s basic material in much the same way that words are the writer’s basic material.”<sup>100</sup>

### B. Building a Dance from the Public Domain

Like all other subject matter of copyright, choreographic works must be “original works of authorship” in order to gain protection.<sup>101</sup> The requirement that a work be “original” is not a requirement that a work be completely new. Instead, the originality requirement dictates that a work must be “independently created by the author,” and it must exhibit a “minimal degree of creativity.”<sup>102</sup> Independent creation simply requires the choreographer’s contribution to the work to be his own, not copied from another source.<sup>103</sup> This requirement does not foreclose the choreographer from gaining copyright protection for his contributions to a preexisting work,<sup>104</sup> as choreographer George Balanchine did when he created *The Nutcracker*.<sup>105</sup> However, it does require a choreographer to be the originator of the material he or she

<sup>96</sup> 789 F.2d 157 (2d Cir. 1986).

<sup>97</sup> *Id.* at 161.

<sup>98</sup> COMPENDIUM II, *supra* note 92, § 450.01.

<sup>99</sup> *Id.* § 450.06.

<sup>100</sup> *Id.*

<sup>101</sup> 17 U.S.C. § 102(a) (2000).

<sup>102</sup> Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

<sup>103</sup> *Id.*

<sup>104</sup> *Compendium II* acknowledges this, stating, “when substantial new choreographic material has been added to preexisting choreography, it may be registered as a new choreographic work.” COMPENDIUM II, *supra* note 92, § 450.08.

<sup>105</sup> Julie Van Camp, *Copyright of Choreographic Works, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK* 59, 75–77 (John David Viera et al. eds., 1994) (discussing fact-finding process necessary to determine Balanchine’s additions to preexisting Ivanov work).

wishes to protect. A choreographer could obtain protection for a work identical to that of another choreographer as long as it was created without copying.<sup>106</sup>

The creative minimum necessary for originality is quite low. It is satisfied by any work that “possess[es] some creative spark, ‘no matter how crude, humble or obvious’ it might be.”<sup>107</sup> Some elements, however, are so commonplace they cannot meet the statutory minimums for originality. These elements alone show no “creative spark”—it is their utilization for expression which is creative and thus capable of obtaining legal protection.

As previously noted, every form of artistic expression possesses some sort of basic “building block” level at which copyright protection is not possible. These building blocks are elements which lack “creative spark,” such as facts, ideas, and universal concepts.<sup>108</sup> The Copyright Act even explicitly states the elements which constitute the building blocks for some forms of works—for example, the building blocks of literary works are “words, numbers, or other verbal or numerical symbols or indicia.”<sup>109</sup>

As acknowledged by *Compendium II*, individual dance steps are a choreographer’s building blocks.<sup>110</sup> In *Compendium II*’s distinction between uncopyrightable elements and copyrightable routines,<sup>111</sup> a proper balance between the public and proprietary domains seems to be met. Most traditional steps cannot be traced to a creative originator, and they are the fundamental bases of many styles of dance. These building blocks of dance should therefore remain in the public domain for general use.

In other ways, however, the Copyright Office faltered in its definition. *Compendium II* further states that the movements in choreography “must be more than mere exercises, such as ‘jumping jacks’ or walking steps.”<sup>112</sup> Nowhere does it make the statement, however, as it does with the basic steps mentioned above, that the *combination* of these elements could constitute an original work.

To ignore this tenet of copyright law and keep the Copyright Office’s definition would squelch the creation of innovative works. Yvonne Rainer’s *Trio A* serves as an excellent example. The subject

<sup>106</sup> Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).

<sup>107</sup> *Feist Publ’ns*, 499 U.S. at 345 (citation omitted).

<sup>108</sup> 17 U.S.C. § 102(b) (2000).

<sup>109</sup> 17 U.S.C. § 101 (2000) (defining “literary works”).

<sup>110</sup> Leslie Erin Wallis, Comment, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1454 (1986) (describing dance steps as “building blocks” from which choreographic work is constructed).

<sup>111</sup> See *supra* notes 98–100.

<sup>112</sup> COMPENDIUM II, *supra* note 92, § 450.03(a).

of some controversy even within the choreographic community,<sup>113</sup> *Trio A* has been described as “reminiscent not of the bravura of a ballet dancer but rather of the competence of a pedestrian walking on the street.”<sup>114</sup> Though composed of difficult movements,<sup>115</sup> it involves “patterns which suggest physical fitness exercises rather than ballet or the technical systems codified by the older generation of modern dancers.”<sup>116</sup> The utilization of seemingly “commonplace” movements does not keep *Trio A* from performing an expressive function: Philosopher Jill Sigman postulates that the work makes a statement about the state of ordinary movement itself.<sup>117</sup> Despite this expressive function, *Trio A* could likely be denied copyright protection under the current Copyright Office regulations, because it utilizes solely ordinary movements.

This specific concern may be moot after *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>118</sup> decided six years after *Compendium II* was released. While *Feist* held that the white pages of a telephone directory are not protected by copyright,<sup>119</sup> the Court explicitly stated that a compilation of uncopyrightable elements is itself copyrightable when “it features an *original* selection or arrangement.”<sup>120</sup> To imply that ordinary movements, like those employed in *Trio A*, are such that even their innovative combination could not secure copyright protection conflicts with *Feist*’s reasoning. An analogy can be drawn between these movements, which individually require no originality, and facts which also lack the requisite originality for copyright protection.<sup>121</sup> While “[n]o one may claim originality as to facts,”<sup>122</sup> *Feist* states that “[f]actual compilations . . . may possess the requisite originality.”<sup>123</sup> A work that contains no protectable expressive elements “meets the constitutional minimum for copyright protection if it features an original selection or arrangement.”<sup>124</sup> Under this understanding of the law, even a choreographic work comprised of *only*

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<sup>113</sup> See Sigman, *supra* note 54, at 499–501 (discussing reactions to *Trio A* by critics and commentators).

<sup>114</sup> *Id.* at 497.

<sup>115</sup> Rainer reports that Sara Rudner, an experienced dancer with a longtime professional relationship with Twyla Tharp, struggled with the choreography. *Id.* at 512 (citation omitted).

<sup>116</sup> *Id.* at 498 (citation omitted).

<sup>117</sup> *Id.* at 523.

<sup>118</sup> 499 U.S. 340 (1991).

<sup>119</sup> *Id.* at 362–63.

<sup>120</sup> *Id.* at 348 (emphasis added).

<sup>121</sup> See *id.* at 347.

<sup>122</sup> *Id.* (quoting 1 M. NIMMER & D. NIMMER, COPYRIGHT § 2.11[A], at 2-157 (1990)).

<sup>123</sup> *Id.* at 348 (emphasis added).

<sup>124</sup> *Id.*

walking steps and jumping jacks could obtain copyright protection if those building blocks were arranged in an original manner.<sup>125</sup>

Despite *Feist*'s exposition of the standard for the protectability of compilations, the fact remains that these provisions of *Compendium II* misrepresent the nature of dance's building blocks. Such building blocks may be the traditional steps of ballet, or, in a changing dance world, movement which seems quite ordinary. One of Congress's motivations for amending the Copyright Act to include choreographic works was to bring new and innovative works under the scope of copyright protection. Even though they had access to the comments of choreographers and other dance professionals concerning the inclusion of choreography in the Copyright Act, neither Congress nor the Copyright Office granted appropriate protection reflecting the needs and desires of the choreographic community. Instead, Congress's failure to define the choreographic building blocks in the public domain allowed the Copyright Office to define them in a manner that is too restrictive, potentially curtailing innovation.

### C. Express Yourself: The Choreographer's Use of Movement As Expression

Copyright does not lend protection to the abstract: The building blocks which an artist uses are not copyrightable subject matter.<sup>126</sup> As only an artist's expression of an idea is copyrightable, a choreographer must have some means of expression in order to create a work eligible for copyright protection. However, the Copyright Office does not specify what a choreographer's means of expression are, as it does for other subject matter of copyright,<sup>127</sup> and thus it is unclear when a work moves from public domain steps to copyrightable expressive choreography.

#### 1. The Choreography's Flow: Movement Brought to the Point of Expression

A choreographer is limited by the medium through which he or she creates—the dancer. Dancers cannot instantaneously move from position to position. Instead, the choreographer guides their progression through space in a manner which reflects what the choreographer wants to express. However, it is not simply the sequence of dance positions which is central to what a choreographer creates. According

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<sup>125</sup> This view is likely controlling, but no court has addressed this part of *Compendium II*.

<sup>126</sup> See *supra* notes 33, 108 and accompanying text.

<sup>127</sup> See *supra* note 109 and accompanying text (listing means of expression for literary works).

to dance educator Dr. Peter Brinson, "Choreographers are most likely to produce ideas suitable for interpretation through movement. . . . [They] think naturally in terms of movement."<sup>128</sup> Thus, movement itself is the choreographer's means of expression. Regardless of the style of execution, expression inheres in how the choreographer progresses the dancers from position to position, not necessarily in the mere order of the positions themselves.

Without a proper definition to direct them to expressive aspects of a choreographic work that can be protected, courts may focus their analysis on incorrect elements. A clear example of this is shown in *Horgan v. Macmillian, Inc.*,<sup>129</sup> the only federal appellate case to deal directly with statutory copyright infringement of a choreographic work.<sup>130</sup> *Horgan* was the result of a dispute between the estate of famed ballet choreographer George Balanchine<sup>131</sup> and the publishers of a book which would have included sixty color photographs of the New York City Ballet Company's production of Balanchine's *The Nutcracker*.<sup>132</sup> The photographs followed the sequence of the story, which was narrated by the book's author, Ellen Switzer.<sup>133</sup> Barbara Horgan, Balanchine's executrix,<sup>134</sup> sought a preliminary injunction, claiming the book was an infringing derivative work of the ballet.<sup>135</sup>

The district court denied the preliminary injunction.<sup>136</sup> Focusing on the fact that it would have been impossible to recreate

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<sup>128</sup> VAN PRAAGH & BRINSON, *supra* note 49, at 124.

<sup>129</sup> 789 F.2d 157 (2d Cir. 1986).

<sup>130</sup> The series of cases involving the Martha Graham estate dealt with choreography, but the issues primarily centered around ownership, transfer of common law, copyrights, and work for hire issues, not copyrightability or infringement. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567 (S.D.N.Y. 2002), *aff'd in part, vacated in part*, 380 F.3d 624 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 2518 (2005).

<sup>131</sup> In an odd moment of foreshadowing, Singer predicted the strength of Balanchine's copyright two years before *Horgan* by stating, "Ultimately, only the most successful choreographers, the Balanchines of the world, are financially successful enough to realize, retain, and capitalize on the economic rights offered by the Copyright Act." Singer, *supra* note 12, at 317–18.

<sup>132</sup> *Horgan*, 789 F.2d at 158–59. This ballet was a derivative work of a nineteenth century folktale by E.T.A. Hoffmann titled *The Nutcracker and the Mouse King* and a previous choreographic work adapting that folktale by the Russian choreographer Ivanov, both of which are in the public domain. *Id.* at 158.

<sup>133</sup> *Id.* at 158–59.

<sup>134</sup> The rights to Balanchine's ballets, including *The Nutcracker*, are managed by a trust which was established by the legatees of Balanchine's estate after his death in 1983. This trust tends to license his ballets to other companies for performance for reasonable fees. See Swack, *supra* note 53, at 268–72. In this case, however, the estate was unwilling to grant the licenses necessary to publish the book. *Horgan*, 789 F.2d at 159.

<sup>135</sup> *Horgan*, 789 F.2d at 159–60.

<sup>136</sup> *Horgan v. Macmillan, Inc.*, 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985), *rev'd*, 789 F.2d 157 (2d Cir. 1986).

Balanchine's work from the book, the court noted "choreography has to do with the flow of the steps in a ballet. The still photographs in the Nutcracker book, numerous though they are, catch dancers in various attitudes at specific instants of time; they do not, nor do they intend to, take or use the underlying choreography."<sup>137</sup>

On appeal, the Second Circuit reversed on the grounds that the district court used an incorrect standard for infringement, instead requiring an analysis on remand of whether the book of photographs was "substantially similar" to Balanchine's choreography<sup>138</sup>—in other words, whether the photographs were of sufficient quality and sequencing to constitute infringement.<sup>139</sup> However, the Second Circuit never acknowledged the district court's assertion about the role of movement in defining choreography.

The Second Circuit's direction that the district court pay attention to the order of the photographs clearly follows from the use of the terms "composition and arrangements" in *Compendium II*'s definition. However, it is the movement between individual dance steps which should be considered the copyrightable element—what the *Horgan* district court correctly identified as the "flow."

The Second Circuit's disregard for the "flow" could grant a copyright holder precisely the type of control which would enable abusive protection of a choreographic work. Without focusing on the flow, a court could find a choreographic work to have infringed another when it utilizes similar positions in a similar sequence, even if it uses completely different movements between those positions, making the works fundamentally different. By ignoring the flow of movement, copyright law fails to protect expression accurately and thus cuts into the area which should remain free of copyright, and free for general use.

## 2. *The Dividing Line Between Expression and the Public Domain*

Choreographic works are composed differently than most art forms judges encounter in copyright infringement cases. Books are created in a manner with which judges are quite familiar—the combination of words into phrases, which then become sentences, until copyrightable expression is formed. Choreographic works share some of the same attributes; they are composed of building blocks which together create expression capable of obtaining copyright protec-

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<sup>137</sup> *Horgan*, 621 F. Supp. at 1170.

<sup>138</sup> *Horgan*, 789 F.2d at 162.

<sup>139</sup> *Id.* at 163.

tion.<sup>140</sup> However, without a statute which clearly identifies the point at which a portion of a choreographic work merits protection, it is confusing to know when something should be in the public domain or available for copyright.

A clear example of this is shown in *Horgan*. The district court analogized each moment of the ballet depicted in a photograph as a single chord from a symphony—inadequate, even in sequence with other randomly selected chords, to recreate and thus infringe an entire work.<sup>141</sup> The Second Circuit took the opposite perspective. Pointing out that taking even a minimal amount of an original may be significant enough to constitute infringement,<sup>142</sup> the court criticized the district court's view on how much choreography could be portrayed in a still photograph.<sup>143</sup> The Second Circuit argued that the viewer's ability to infer the actions in the moments directly preceding and following the moment captured in the photograph meant that each photograph portrayed much more of the choreographic work than a mere chord would of a symphony—instead, “[a] snapshot of a single moment in a dance sequence may communicate a great deal.”<sup>144</sup>

On its face, the Second Circuit's position does appear defensible. An infringer need not copy the entirety of a work to infringe the author's copyright.<sup>145</sup> Nevertheless, the Second Circuit's reasoning was flawed by a misunderstanding of what constitutes “expression” for a choreographer. The amount of information depicted in a photograph may in fact conjure a picture of movement in the mind of the viewer, but whether that movement comes to the point of protectable expression is another question entirely. It is true that “what goes up must come down”; however, this does not mean that an expressive element can be anticipated. Individual dance steps often involve the combination of motion, such as the preparation for a turn, the turn itself, and the landing, also known as the recovery. Even though more than one step or position is involved, the combination is what is necessary to execute the movement. Because the combination is based in necessity, it involves minimal expression by the choreographer and cannot receive copyright protection.<sup>146</sup> For example, a photograph might capture a dancer at the apex of a split leap, or *grande jeté* in the

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<sup>140</sup> Wallis, *supra* note 110, at 1454.

<sup>141</sup> *Horgan*, 621 F. Supp. at 1170 n.1.

<sup>142</sup> *Horgan*, 789 F.2d at 162.

<sup>143</sup> *Id.* at 163.

<sup>144</sup> *Id.*

<sup>145</sup> Anne K. Weinhardt, Note, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 855–60 (1988).

<sup>146</sup> Van Camp, *supra* note 105, at 67. The choreographer may use the specific posture or presence of the dancer as a medium of expression. While this is true, whatever expression

terminology of ballet. While we may assume that the dancer began at and will return to a standing position, the movement implied is the movement of a single building block element, not of something grander that should be afforded protection.

It is not clear from the record in *Horgan* whether the sum of the photographs could have together implied copyrightable movement. Indeed, the Second Circuit remanded on that point.<sup>147</sup> However, without a clear showing that the flow of the choreography was copied by an allegedly infringing work, a finding of copyright infringement should not stand.

The courts need a definition which describes with clarity the minimum levels at which a movement becomes a choreographer's expression. Without such a definition, courts will follow *Horgan* and be inclined to enforce copyrights in an overly broad manner. Because there is no definition of choreography to point the courts to the flow of a particular work, a first-comer may be able to obtain copyright on an element which should not be copyrightable and enforce that copyright against others in a manner which discourages, instead of encourages, innovation. As will be shown in the next section on the fixation requirement, confusion as to what is defined by choreography is only exacerbated through attempts to record the expressive, and thus protected, elements of a choreographic work.

#### *D. In a Fix: Placing Choreography in a Tangible Medium of Expression*

Since the Constitution empowers Congress to protect the "Writings" of "Authors,"<sup>148</sup> choreographic works, like all other copyrightable subject matter, must be fixed to obtain statutory protection. The Copyright Act states:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy . . . , by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.<sup>149</sup>

This requirement has the unintended result of both denying copyright protection to expression which should merit it, thus placing too much in the public domain, while at the same time granting propri-

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is captured in one specific movement or position is likely de minimis expression and cannot be protected.

<sup>147</sup> *Horgan*, 789 F.2d at 163.

<sup>148</sup> See *supra* note 42 and accompanying text.

<sup>149</sup> 17 U.S.C. § 101 (2000).

tary rights to that which does *not* constitute expression, allowing too much to be controlled in a proprietary manner.

### 1. Fixation—Copyright's Necessary Evil

Conflicts between fixation and the very nature of the choreographic process may create an imbalance between the public and proprietary domains. For many art forms, fixation in tangible form occurs when a work is created.<sup>150</sup> While this may be true for writers or painters, who create a tangible copy of their work as they compose, this is not true for dance, where the fixation process is usually quite separate from the process of composing or creating the dance.<sup>151</sup> Most choreographers come to rehearsals with only an idea of what they desire to create,<sup>152</sup> or at most, notes which would be insufficient to gain copyright protection due to their incomplete nature.<sup>153</sup> The dances are constructed in a process which utilizes the choreographer's ideas and the abilities of the dancers<sup>154</sup> to construct what will be the final choreographic work.<sup>155</sup> As Professor Traylor states, "When the choreographer is satisfied that the dancers in movement express his or her artistic ideas, the choreography, in the language of the dance world, is 'set.'"<sup>156</sup>

Dancers have traditionally relied on memory to preserve and transmit choreographic works.<sup>157</sup> As most choreographers do not use a detailed system of written notation, the dance is usually preserved only in the minds of the dancers and the choreographer. Memory, for obvious reasons, is not considered to be a tangible form of fixation. It is also an imprecise method of retaining choreography,<sup>158</sup> which has resulted in the loss of much of the choreography produced in the last

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<sup>150</sup> Traylor, *supra* note 19, at 238 (quoting 17 U.S.C. § 101).

<sup>151</sup> *Id.*

<sup>152</sup> Wallis, *supra* note 110, at 1459.

<sup>153</sup> Choreographer Paul Taylor has stated, "With some pieces I've done a lot of thinking and planning and practically written a script. . . . Other times I just call rehearsal and start." CYNTHIA LYLE, DANCERS ON DANCING 115 (1977).

<sup>154</sup> Taylor describes his work with the dancer as "very specific and tyrannical," placing dancers "step by step and inch." *Id.*

<sup>155</sup> In describing his work as a dancer with choreographer Lew Christensen, Richard Carter states, "When he went to set the work on me . . . I couldn't do that! No one could do that! So he had to rechoreograph it." Jim Williams, Creators: Does Lew Get His Due? (1994) (unpublished manuscript), <http://novia.net/~jlw/essay/essaylew.html>.

<sup>156</sup> Traylor, *supra* note 19, at 234, 237.

<sup>157</sup> *Id.* at 235, 238.

<sup>158</sup> Choreographer Paul Taylor has stated, "I . . . have a very bad memory." LYLE, *supra* note 153, at 115.

hundred years, even when the dancers claim to have remembered it.<sup>159</sup>

While choreographers such as Balanchine embraced copyright law as a means of controlling their choreographic works posthumously, other choreographers see their work as intertwined with their own vision. In this quality, choreography differs greatly from other copyrightable subject matter such as plays or music. While a playwright or a composer, for example, likely expects his or her work to be interpreted and performed by others, a choreographer may not wish his work to be performed without his guiding hand or the supervision of someone he has personally trained.<sup>160</sup> Some choreographers resist fixation because they fear its effects on their work. As one Australian ballerina suggests, “the very act of preservation [by fixing choreography in tangible form] can remove all signs of life from the work!”<sup>161</sup> The fixation requirement thus appears to conflict with the very way that many choreographers think about their art.

However, the fixation requirement is a necessity in any copyright scheme. The necessity of fixation to determine infringement was detailed in the original report submitted to Congress, which stated “in the absence of a record of the dance movements in some fixed form, it would often be extremely difficult, if not impossible, to determine whether a choreographer’s creation was being reproduced in a dance performed by others.”<sup>162</sup>

## 2. *Making Dance Tangible: Compendium II’s Guidelines for Fixation*

The Copyright Office’s *Compendium II* specifically addresses forms of fixation which are appropriate and inappropriate to obtain copyright protection for a choreographic work. The fixed form of a choreographic work must be one which is “capable of performance as submitted,”<sup>163</sup> if recreated from fixed form. Broad outlines which do not depict the dancer’s movements with “certainty” are inadequate,<sup>164</sup>

<sup>159</sup> Fernau Hall, *Dance Notation and Choreology*, in *WHAT IS DANCE?: READINGS IN THEORY AND CRITICISM* 390, 391 (1964) (Roger Copeland & Marshall Cohen eds., 1983).

<sup>160</sup> Choreographer William Forsythe stated: “It’s in my will . . . that when I die, my works won’t be performed. Because ballet is a living art.” Brendan McCarthy, *Preserving Forsythe?*, BALLET MAG., Nov. 2001, [http://www.ballet.co.uk/magazines/yr\\_01/nov01/bmc\\_preserving\\_forstyhe.htm](http://www.ballet.co.uk/magazines/yr_01/nov01/bmc_preserving_forstyhe.htm). Forsythe’s concerns are not uncommon in the dance community; choreographer Michel Fokine wrote, “After my death the public, watching my ballets will think ‘What nonsense Fokine staged!’” *Id.*

<sup>161</sup> Janet Karin, *Copyright: Preservation or Embalming?*, BROLGA, Dec. 1997, at 19, 20.

<sup>162</sup> Varmer, *supra* note 77, at 94.

<sup>163</sup> COMPENDIUM II, *supra* note 92, § 450.05.

<sup>164</sup> *Id.* § 450.07.

but can be registered as a literary work instead of a choreographic work.<sup>165</sup>

The Copyright Office prefers forms of notation which may be more precise, but which for various reasons are not universally embraced by the choreographic community. Written notation systems, such as Labanotation and Benesh Notation, are considered most appropriate,<sup>166</sup> as are narrative descriptions which indicate “detailed movements of the dancers,”<sup>167</sup> because of their ability to capture the exact position and intended movement of the dancer in a manner even more precise than film.<sup>168</sup> However, most choreographers do not know the Copyright Office’s preferred languages of written notation. Thus, to gain the most protection available under Copyright Office policy, experts must be hired to fix the choreographic work.<sup>169</sup> The cost of this process is prohibitively expensive for most choreographers—twenty minutes of Labanotation can cost up to \$12,000,<sup>170</sup> and the time required to notate the average ballet is approximately 10,000 hours.<sup>171</sup> For working choreographers more interested in copyright protection for economic control than for preservation of the art form, written notation is an unattractive option.

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<sup>165</sup> *Id.* § 450.07(c).

<sup>166</sup> *Id.* § 450.07(b). These systems of notation mark the placement and movements of the dancer on a staff, somewhat reminiscent of what is used in music. For a basic introduction to Labanotation, see Dance Notation Bureau, Dance Notation Bureau Homepage: Read a Good Dance Lately?, <http://www.dancenotation.org/lnbasics/frame0.html> (last visited Sept. 30, 2005).

<sup>167</sup> COMPENDIUM II, *supra* note 92, § 450.07(c).

<sup>168</sup> These systems of notation are extremely precise and lack the disadvantages of recording dance on film, such as confusion and the recording of improper movement. One dance commentator stated that Benesh Notation made it possible “to make a single but precise and complete record of the dancing of a single person no matter what technique or style was used . . . .” Hall, *supra* note 159, at 396. He went on to say, “[T]his in turn made it possible to build up a full score without generating a mass of symbols so complex that no one could read them.” *Id.* Benesh notation further records, at each moment in time, the movements of all body parts of each person on stage, the rhythm of these movements, their relationship with the music, the stage, the other dancers, and other aspects of the choreography. *Id.* It is thus most able to capture the flow of the choreographer’s work.

<sup>169</sup> See Traylor, *supra* note 19, at 235.

<sup>170</sup> Margaret Putnam, *Notation Takes Steps to Preserve Dance*, DALLAS MORNING NEWS, Dec. 6, 1998, at 1C.

<sup>171</sup> *Id.* Agnes DeMille once described the process of notation as follows:

[The notator] worked for two hours taking it down. And in two hours, she got eight bars of one dancer. And then somebody else came in and read it back—approximately, not exactly. Now that was two hours, and we had gotten approximately the movements of one dancer. . . . [A]t that part of the dance, there were eighteen onstage . . . .

LYLE, *supra* note 153, at 56.

According to *Compendium II*, fixation using film is also acceptable.<sup>172</sup> Some choreographers, including Agnes DeMille, actually prefer to use film.<sup>173</sup> Using film to fix dance in tangible form may be less expensive than written notation, considering the declining costs of home video recording equipment. However, as noted by the Copyright Office, video notation has its limits—it only extends protection to “what is disclosed therein.”<sup>174</sup> As Barbara Horgan, executor of the Balanchine Trust, has stated, “video is cruel to dance.”<sup>175</sup> Film may be inaccurate, as it may capture a dancer’s mistake or unintended addition to the choreographer’s work.<sup>176</sup> Finally, film cannot capture the exact placement and balance of the dancers intended by the choreographer,<sup>177</sup> which may be necessary to recreate the work with accuracy. Choreographers aware of these limitations may be hesitant to rely on film for the purposes of obtaining copyright because they may doubt its effectiveness.

Additionally, computer notation systems, although not specifically addressed in *Compendium II*, are probably also adequate methods of fixation.<sup>178</sup> Computer notation may also be less expensive than written notation, and is preferred by some noted choreographers such as Merce Cunningham.<sup>179</sup> However, the process of utilizing computer notation changes the process most choreographers use to compose their works. Instead of working directly with dancers, choreographers first compose the dance on the computer.<sup>180</sup> The dancers then mimic the forms depicted on the computer screen to learn the dance.<sup>181</sup> Preexisting dances must be entered into the computer by the choreographer, a duplicative and time-consuming process about which even fans of computer notation like Cunningham admit, “To put it all (into the computer) would take years . . .”<sup>182</sup> Computer notation is thus rejected by many in the choreographic community.<sup>183</sup>

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<sup>172</sup> COMPENDIUM II, *supra* note 92, § 450.07(a).

<sup>173</sup> LYLE, *supra* note 153, at 56.

<sup>174</sup> COMPENDIUM II, *supra* note 92, § 450.07(a).

<sup>175</sup> Sheryl Flatow, *The Balanchine Trust: Guardian of the Legacy*, DANCE MAG., Dec. 1990, at 58, 61.

<sup>176</sup> Wallis, *supra* note 110, at 1463.

<sup>177</sup> Weinhardt, *supra* note 145, at 848–49.

<sup>178</sup> Cramer, *supra* note 26, at 151.

<sup>179</sup> Ann Holmes, *Laptop Choreography: Dance Program Reflects Cunningham's Computer Experiments*, HOUSTON CHRON., Jan. 14, 1996, ZEST (Magazine), at 11.

<sup>180</sup> See, e.g., Genevieve Katz, *Life in the Fast Lane*, DANCE MAG., Nov. 1998, at 74, 76.

<sup>181</sup> *Id.*

<sup>182</sup> Molly Glentzer, *Cunningham Still on the Move*, HOUSTON CHRON., May 8, 2003, Preview, at 6.

<sup>183</sup> Cramer, *supra* note 26, at 151 (noting choreographer Jeff Bickford’s reaction to use of computers in choreography to be: “Using computers to develop dance forms to find new things that human beings can do, I mean, that sounds like such a crock to me.”).

### 3. *Flawed Fixation and its Impact on the Public and Proprietary Domains*

#### a. Fixation Captures Too Much Public Domain Material

Fixation as it currently stands will have a negative effect on the public domain when combined with a substantial similarity analysis, as used in *Horgan*. Forms of fixation such as video may capture material which is not intended to be part of the choreography. Choreographers themselves doubt the ability to properly reconstruct a dance using video alone.<sup>184</sup> When the artists whom the 1976 Act purports to assist fear that a form of fixation is inaccurate, it becomes an important question whether that form should be used as a method of comparison between an original and a possibly infringing work.

If fixation is not capturing expression, then it is capturing material which should be in the public domain. In an infringement action, courts will compare the fixed versions of two choreographic works. The choreographer asserting that the other has infringed may be able to point to aspects which appear similar in the fixed copy of the work, but which are actually elements that should be relegated to the public domain. The Copyright Act and the definitions provided by the Copyright Office do not clearly denote what is copyrightable expression and what is public domain material, allowing the choreographer to claim a proprietary right to an aspect of the work which should be denied copyright protection. This will improperly detract from the public domain by giving proprietary rights in material which does not deserve it. Using film and other imprecise means to fix choreography will open up the possibility of a wide circle of abstraction for the substantial similarity analysis, which will further result in choreographers being able to claim more rights than should be necessary to encourage innovation.

#### b. Fixation Grants Proprietary Rights Disproportionately to the Rich

Further, while “the copyright law is to be uniformly applied across a variety of media,”<sup>185</sup> the technical aspects of conforming to the fixation requirement fall more severely on choreographers than on any other group of artists and foreclose many of them from relying on

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<sup>184</sup> Choreographers doubt film’s ability to properly capture the flow of their work, or the possibility of properly reconstructing a choreographic work from film. However, choreographic works can be copied from a filmed version in a substantial enough manner to constitute infringement. This does not mean that the film was a true fixation of the choreographer’s produced work—an exact copy is not necessary for infringement.

<sup>185</sup> Williams v. Crichton, 84 F.3d 581, 590 (2d Cir. 1996).

copyright to protect their works.<sup>186</sup> While utilizing less expensive and less laborious methods of fixation may appear to be simple solutions to those outside the choreographic community, some choreographers may be uncomfortable with resorting to these less precise measures. The existence of these alternate forms of fixation is irrelevant if the dance community doubts their effectiveness and fails to rely on them.

By implication, anything for which an author does not seek copyright protection falls into the public domain. If an author never complies with the requirements for copyright protection, he cannot rely on copyright if another author copies his work. Because of this, the hesitance of some choreographers to conform to the fixation requirement will de facto result in an over-delegation of works to the public domain.

It could be argued that this is a risk that choreographers are willing to take—if they do not meet the fixation requirements, they do not merit protection. However, this opens the doors for those who *can* afford to meet fixation requirements to take the works created by these choreographers—and actually deprive their originator of use by seeking copyright protection. Thus, the copyright law creates an imbalance between the public and private domains by granting the rich greater access to the private domain.<sup>187</sup>

### III

#### GETTING COPYRIGHT EN POINTE: RECOMMENDATIONS FOR BALANCED PUBLIC/PROPRIETARY DOMAINS

A proposed statute must address the concerns raised in Part II of this Note without falling into the trap of creating further ambiguity. It must provide certainty and a clear designation between public and private domains in order to foster innovation. As copyright is intended to assist a choreographer in protecting the economic value of his work,<sup>188</sup> it is all the more important that the Copyright Act represent a careful balance between the freedoms needed by all choreographers, and the controls over their own work that they wish to exercise. This Part spells out suggestions, based on the preceding Parts, for amendments to the Copyright Act that are intended to resolve the ambiguities.

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<sup>186</sup> Traylor, *supra* note 19, at 237–38 (noting that cumbersome and expensive nature of fixation requirement may discourage choreographers from utilizing Copyright Act protections).

<sup>187</sup> In fact, other commentators have argued that the current construction of the Copyright Act favors large companies over smaller choreographers. See generally, e.g., Lopez de Quintana, *supra* note 13.

<sup>188</sup> See *supra* notes 39–54 and accompanying text.

ties currently complicating the application of copyright law to choreographic works.

#### A. *Clear Definitions*

Clear definitions will give the courts an idea of what standards to apply, as well as notifying potential rights holders of what can or cannot be protected. Courts should not need to look to the legislative history of the Act to uncover a mandate to respect the wishes of the artistic community, especially when the legislative history is as sparse as in the case of choreography. Instead, the Congressional definition of choreographic works should effectively reflect those wishes in a manner comprehensible by the legal community.

At the same time, a definition should not have the unintended effect of improperly shrinking the public domain. Choreographers need a full range of material with which they can construct their dances. Choreographers must remain capable of utilizing public domain elements without fear that they will stunt the creativity of their peers.

In keeping with these goals, I propose the following definition of choreographic works: “A choreographic work is a choreographer’s expression represented by the planned flow of one or more dancer’s movement in time through body positions and spatial arrangements. Choreographic works are not individual positions or movements, nor basic combinations, but may be composed of the combination of them.”

This proposed definition both grants protection to the expressive elements of choreography and protects the public domain. It expands on *Compendium II* by adding a focus on the contribution of the choreographer. It further emphasizes that movement, itself, is important. Such a definition should better separate expressive work characterized by the work’s flow from less creative elements which should remain in the public domain.

A problem with a more specific definition of “choreographic work” is that it may be overly limiting for some,<sup>189</sup> especially those who believe that choreography is “anything a choreographer presents to the public.”<sup>190</sup> Though the definition strives to protect innovative works, highly conceptual projects such as Paul Taylor’s *Duet*, which consists of two men sitting motionless on a stage,<sup>191</sup> may still slip

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<sup>189</sup> Van Camp, *supra* note 105, at 61 (arguing definition based upon current notions of dance would restrict future innovation).

<sup>190</sup> Singer, *supra* note 12, at 297.

<sup>191</sup> Van Camp, *supra* note 105, at 60.

through the cracks. However, the benefits of this definition are that the *flow* created by the choreographer is clearly protected, in a manner which leaves room for future creation based on what remains in the public domain. Thus, the choreographer can control what he has created, but others have the freedom to use what is, under this scheme, clearly unrestricted.

### B. Fixing Fixation

The purpose of a tangible copy is to guide the courts in an infringement action. Fixed copies which do not clearly depict expression are therefore ineffectual at guiding the courts and unlikely to be trusted by the choreographer. If a court is basing its decision on an ambiguous fixed copy, the result will be a diminished public domain or inadequate protection.

Some would argue against having a fixation requirement at all.<sup>192</sup> However, there may be constitutional problems with eliminating the fixation requirement,<sup>193</sup> and this Note does not suggest doing so. Fixation is essential to meet the need for notice of what is copyrighted, as well as the need to preserve the art form. However, due to the difficulties a choreographer endures in fixing a work in tangible form, leeway should be given to the choreographer's actual uses.

The fixed copy of the work deposited to the Copyright Office for the purposes of registration should be as detailed as physically possible, taking into consideration the abilities of the choreographer. Infringement protection should be afforded only so far as what can be comprehended from the form of fixation; however, copyright should not be completely denied to works which are not fixed in forms detailed enough to be staged by an individual other than the choreographer. The fixed form of a choreographic work should thus be seen as a plan which necessarily does not and cannot embody all the nuances of a choreographic work. As long as it depicts the movement and flow of the piece, it should suffice.

This is not inconsistent with current law. The Copyright Act does not currently require a deposited fixed copy to be an exact depiction of the work it represents, and the Act allows the Copyright Office to exempt certain works from the deposit requirement.<sup>194</sup> This provision

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<sup>192</sup> See Lopez de Quintana, *supra* note 13, at 171.

<sup>193</sup> See *supra* text accompanying note 148 (noting textual basis for constitutional requirement of fixation); cf. Wallis, *supra* note 110, at 1466–68 (arguing that copyright can meet constitutional requirements without fixation).

<sup>194</sup> 17 U.S.C. § 407(c) (2000). See also the Copyright Office's provisions for deposit of computer code, which only require an "identifying portion[ ]" consisting of the beginning and ending of the source code. U.S. COPYRIGHT OFFICE, CIRCULAR 61: Copyright Regis-

should be utilized for the deposit of fixed copies of choreographic works in order for copyright protection to be enjoyed by the choreographic community.

However, it is essential that the form of fixation be able to capture the expressive nature of the choreographic work. Courts must take into consideration the limitations of the accepted forms of fixation and err on the side of caution so as not to grant copyright protection to material which should remain in the public domain. Experts should be retained in these cases to give the courts some direction as to what should and should not constitute expression, and infringement should only be found in those cases where the expression identified in the fixed form itself is copied. Beyond mere statutory infringement, legal professionals and the Copyright Office must take care to inform the dance community of the benefits of fixing their work in tangible form in order to obtain copyright protection.

Thus, a potential fixation requirement could read: "Choreographic works may be fixed in any tangible form from which they can be perceived and recognized. Protection is limited to the expressive movement and flow, as depicted in the fixed copy." This modified requirement would eliminate concerns that current methods of fixation leave out the most important part of the copyrighted choreography—the expressive elements.

## CONCLUSION

The status quo in the dance community was developed when very few had the right to argue that another choreographer had infringed their legal rights by copying their work. Now that copyright protection is open to all choreographers, there are far more players who can assert copyright protection, which will change the culture's acquiescence to copying. To the extent that the current construction of the Copyright Act is overinclusive, granting proprietary rights to some works that should be relegated to the public domain, choreographers and their legal advisers may be confused as to exactly what they can use as the building blocks for their creations. Additionally, to the extent that current copyright protection is underinclusive, some choreographers will be unable to reap the financial benefits of copyright protection, which in an increasingly commercial world may render them financially unable to continue creating.

Clearly, the proposed amendments will not satisfy every member of the dance community or the parties who interact with it. They may

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tration for Computer Programs 1 (2002), *available at* <http://www.copyright.gov/circs/circ61.pdf>.

lead to an increase in litigation by choreographers as well as unnecessary complications in the staging of licensed choreographic works. Additionally, allowing less strict fixation standards may complicate litigation in some cases, and will fail to give choreographers who cannot afford detailed fixation a strong stance in the courtroom.

On the other hand, the benefits of the advocated provisions strongly outweigh the possible harms. Most importantly, a choreographer's attempts to protect his or her works from plagiarism would no longer be met by substantial difficulties. Judges presiding over copyright infringement cases involving choreography would have clearer guidelines to apply. These revisions to the Copyright Act would create a regime which strikes a better balance between the seemingly mutually exclusive goals of control and freedom which are sought by choreographers.