PROTECTION OF CHOREOGRAPHIC WORKS: A COMPARATIVE APPROACH

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ABSTRACT

This article explores the complexities of claiming copyright for dance works, which is not as straightforward as for other artistic forms. Despite these challenges, the proliferation of social media and internet technologies in recent decades has significantly enhanced the ability to identify the original creators of dance works and enforce their rights, especially when these works go viral. The article examines the conditions under which dance moves and choreographic works are considered copyrightable and assesses the success of enforcement efforts across different legal systems. The analysis aims to clarify the legal landscape surrounding the protection of dance works and the implications for creators in a digital age.

Key words: Copyright, Dance Works, Choreography, Economic Rights, Originality, Fixation, Legal Systems, Moral Rights.

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PROTECCIÓN DE OBRAS COREOGRÁFICAS: ANÁLISIS COMPARATIVO

RESUMEN

Este artículo explora las complejidades del reclamo de derechos de autor para las obras de danza, lo cual no es tan sencillo como para otras formas artísticas. A pesar de estos desafíos, la proliferación de las redes sociales y las tecnologías de internet en las últimas décadas ha mejorado significativamente la capacidad de identificar a los creadores originales de obras de danza y hacer cumplir sus derechos, especialmente cuando estas obras se vuelven virales. El artículo examina las condiciones bajo las cuales los movimientos de danza y las obras coreográficas son consideradas susceptibles de protección por derechos de autor y evalúa el éxito de los esfuerzos de protección en diferentes sistemas legales. El análisis busca aclarar el panorama legal en torno a la protección de las obras de danza y las implicaciones para los creadores en la era digital.

Palabras clave: derecho de autor, obras de danza, coreografía, derechos patrimoniales, originalidad, fijación, sistemas legales, derechos morales.

INTRODUCTION

The protection of dance works under copyright law has become a significant concern for choreographers globally. Such protection ensures that choreographers are recognized as the authors of artistic creations that require considerable time and effort, and it allows them to benefit economically from their exploitation. The extent of this exploitation, however, depends on the rights granted to the author within the applicable copyright framework. Yet, copyright law often fails to safeguard certain choreographic works, as not all sequences of dance movements meet the criteria for protection.

The economic benefits derived from the exploitation of these choreographic works include royalties from public performances and licenses for use in audiovisual media. However, due to the inherent nature of these works and the challenges in defining the scope of protection—such as the requirements of originality and fixation—the legal landscape for managing these benefits remains unclear in various jurisdictions.

This article seeks to provide a comprehensive understanding of the protection of choreographic works through a comparative analysis of the requirements imposed by different legal systems, as well as an examination of the enforcement of rights derived from such artistic creations.

Therefore, the article is organized into six chapters, followed by a conclusion. The first two chapters explore the history of dance as an artistic expression of humanity and the origins of its legal protection. These chapters lay the foundation

for understanding the types of works that have historically been granted copyright protection.

Chapter three evaluates the protection requirements established by various legal systems. To conduct a thorough analysis, and due to their significant influence on the dance industry, the primary focus will be on European and American jurisdictions. Additionally, brief references will be made to other jurisdictions, including the Andean Community, Canada, the United Kingdom, and Asian countries such as India, China, and South Korea. A distinction will also be drawn between civil law and common law systems.

Chapter four examines which works qualify as choreographic under a global perspective. Specific dance types will be discussed to identify characteristics that may exclude certain works from being classified as choreographic works under copyright law.

Chapter five addresses moral rights, a special category of personal rights. Although recognition of these rights is mandatory for signatories of the Berne Convention, their application is particularly contentious in the United States.

Finally, the last chapter assesses the nature and scope of copyright exceptions, analyzing their importance with a special emphasis on their interconnection with human rights.

This article aims to contribute to the legal literature on art law and serve as a guide for readers interested in the art industry and the copyright protection of choreographic works. By enhancing knowledge of common practices in the dance industry concerning legal protection for choreographers, this work is particularly relevant given the industry's growth in the digital age.

I. BRIEF HISTORY OF DANCE

Before delving into the history of the legal protection of dance, it is essential to first explore the history of dance itself as an artistic and cultural expression within society.

Since ancient times, humans have employed various bodily movements to communicate emotions and moods. Consequently, dance has been an integral part of many cultures, serving as a means of emotional expression, a component of rituals and ceremonies, and a healing technique. Through these diverse functions, dance fosters a bond within communities and stands as a fundamental act of expression inherent to the human experience.

Given its ephemeral nature, identifying the precise geographic origins and historical moments of dance poses significant challenges. The presence of early dance forms can only be deduced from the artistic and literary records of classical civilizations such as Egypt, India, Greece, and Rome. Historically, dance has been perceived through a dichotomous lens—both as a popular cultural expression and as an artistic creation designed for performance before an audience.

While Hindu dance traditions in India boast a rich performance history spanning millennia, it was in Ancient Greece that dance was formally introduced as a scenic art, closely intertwined with the tragicomedy literary genre[1]. As dance evolved into pantomime during the Roman Empire, it was increasingly viewed with suspicion and was even restricted in the colonies, being associated with immorality and sexuality[2]. This censorship persisted into the Middle Ages, as the Christian Church deemed dance a pagan rite, further marginalizing its practice.

The Renaissance period marked a significant revitalization of dance, culminating in the birth of ballet. During this era, a shift in perspectives on knowledge and the world occurred, with humans being placed at the center of culture and thought. This humanistic outlook allowed dance to reclaim its importance in society. In this new social context, the Italian bourgeoisie began to compete by staging performances for foreign visitors as a display of wealth and power. It is no surprise, then, that the first practical dance manuals emerged in Italy. The earliest known manual, dated to 1450, was authored by Domenico da Piacenza, who is regarded as the first choreographer in history. In his manual, titled *De Arte Saltandi et Choreas Ducendi*, Da Piacenza laid down the fundamental elements of dance, including rhythm, musicality, step patterns, and evolutions. He also classified dance steps into "natural" movements, such as walking, and "accidental" movements, like running steps or changes of foot.

Dance masters like Da Piacenza taught various sequences of steps to the nobility, enabling them to participate in performances at royal courts as a form of social entertainment. These performances gradually evolved into the famous ballet operas, which, during the Romantic period, were heavily influenced by the Russian school. Russian choreographers, such as Marius Ivanovich Petipa —renowned for co-choreographing *Swan Lake* and *The Nutcracker* with Lev Ivanov— introduced narrative choreography, where the dance itself conveyed the story. This innovation helped transform ballet into a grand spectacle.

By the 20th century, the definition of dance had expanded to encompass a wide range of individual and collective artistic expressions. This broader understanding led to the emergence of modern dance, characterized by various styles rooted in traditional rhythms and musical rituals from different regions. The ordinary began to be celebrated, and the classical, stylized forms of dance were set aside in favour of a new concept that embraced unsophisticated movements. The beauty of simplicity gained prominence, paving the way for the dance styles we are familiar with today, which are products of globalization and cultural exchange.

1 Ana Abad Carles. *Historia del ballet y de la danza moderna.* Alianza Editorial, 2004, pp. 15-17.

2 "Breve historia de la danza". En *Los bailes de salón* [en línea]. (Consulta: 28 de agosto de 2022).

II. HISTORY OF COPYRIGHT PROTECTION FOR CHOREOGRAPHIC WORKS

The story of copyright protection for choreographic works begins with the international harmonization efforts that took shape in the late 19th century. In 1886, the Berne Convention was established, marking a pivotal moment in the protection of authors' rights. This landmark treaty set a minimum standard of protection for literary, scientific, and artistic works across signatory countries, ensuring that creations, regardless of their form or mode of expression were safeguarded[3]. Importantly, the Convention recognized not just the rights to reproduce, adapt, and publicly perform works, but also introduced the concept of moral rights. These rights allowed authors to claim authorship and object to any alterations of their work that could harm their honor or reputation[4]. The Berne Convention also established a protection term of 50 years after the author's death, with countries free to extend this period. Today, only a handful of countries —14, to be exact— have yet to join this international framework.

Fast forward to the modern era, and the influence of the Berne Convention can still be felt. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, adopted by World Trade Organization (WTO) members, requires compliance with the substantive provisions of the Berne Convention. This means that even countries not formally party to the Berne Convention must still adhere to its key principles. However, there is an exception: TRIPS does not obligate members to recognize the moral rights outlined in Article 6bis of the Berne Convention, leaving a gap in global enforcement of these particular protections.

At the heart of the Berne Convention is Article 2, which outlines the scope of works eligible for protection. The article casts a wide net, offering protection to all literary and artistic works regardless of their form of expression. It also provides a non-exhaustive list of protected works, offering flexibility and guidance for national lawmakers.

Over time, most signatory countries have embraced this open-ended approach to copyright protection, incorporating it into their national laws. For instance, many European Union countries, such as Bulgaria[5], Czech Republic[6], Estonia[7], Greece[8], Spain[9], France[10], Croatia[11], Italy[12] or the Netherlands[13], have explicitly

3 Berne Convention for the Protection of Literary and Artistic Works, 1979, Art. 2(1).
4 *Ibid.*, Art. 6 Bis.
5 Law on Copyright and Neighbouring Rights of 29 June 1993, Article 3.3. (BG).
6 Act No 121/2000 Coll. on Copyright and Rights Related to Copyright and on Amendment to Certain Acts, Article 2.1.(CZ).
7 Copyright Act 1992, § 4 (3.8) (EE).
8 Law 2121/1993, Article 2(1) (GR).
9 Law on Intellectual Property' approved by means of the Royal Legislative Decree 1/1996, of 12 April 1996, Article 10.1.c (ES).
10 Code de la Propiété Intellectuelle 1992, Article L 112-1.4 (FR).
11 Croatian Copyright and Related Rights Act (CRRA), Article 5.2.(HR).
12 Law No 633/1941, Article 2.3. (IT).
13 Copyright Law, Article 10.1. (NL).

recognized choreographic works as protected under their laws. This approach ensures that even evolving forms of artistic expression, like dance, are safeguarded.

However, the story takes a different turn in countries with common law traditions, where a closed-ended approach is often preferred. In these jurisdictions, such as Cyprus and Malta, copyright law is defined by exhaustive lists of protected works. While this approach offers clear legal boundaries, it can also result in the exclusion of newer, less conventional forms of art. For example, these countries may protect "artistic works" broadly, but without specific mention of choreographic works, the courts are left to interpret what qualifies as art, potentially leaving some creative expressions unprotected[14].

A similar tension between tradition and evolving artistic recognition can be seen in the United Kingdom. The story of copyright protection for creative works in the United Kingdom (UK) begins with the Statute of Anne in 1710, the first copyright statute in existence. Initially, the statute focused on granting privileges and monopolies to printers of books, but over time, the scope of copyright expanded to cover other types of works, such as translations and derivative works. Today, copyright protection in the UK extends to a wide array of works, including maps, performances, paintings, photographs, sound recordings, motion pictures, and computer programs[15]. However, it wasn't until the 20th century that many of these categories, particularly choreographic works, were formally recognized and protected under copyright law.

The Statute of Anne initially provided copyright protection only to literary works expressed in books, leaving other creative works like music, engravings, paintings, drawings, and photographs to be protected through case law or specific Acts of Parliament. Choreography, in particular, didn't receive formal copyright protection in the UK until the enactment of the Copyright Act of 1911. This Act, which amended the UK's copyright law following recommendations by a Royal Commission in 1878, extended copyright protection to dramatic works, including ballets, pieces in dumb show, and cinematograph productions. Today, the Copyright, Designs and Patents Act 1988 (CDPA) recognizes eight categories of copyright-protected works, with choreographic works falling under the category of dramatic works as specified in Section 3(1)(d).

The UK's approach to copyright protection, particularly its closed-ended list of protected works, was a point of contention during its membership in the European Union. The closed list was seen as incompatible with European law[16], which favored a more open-ended approach. However, following Brexit, the UK may revert to a closed list of copyright works, though European case law remains binding on English courts until a legislative change or a court decision departs from it.

14 Nishant Thakur and Sandra Anil Varkey. "Closed list approach versus open-ended approach in subject-matter copyright". In *SCC Times* [online], 28 March 2021.
15 "History of Copyright". In *Wikipedia*, 12 November 2020.
16 See Cofemel - Sociedade de Vestuário SA v G-Star Raw CV, 2019, Case C-683/17, Para. 24.

The protection of choreographic works in the UK has seen limited jurisprudence, but one of the most notable cases was the dispute between Russian choreographer Léonide Massine and ballet impresario Wassily de Basil over the ownership of "Massine's ballets". In the case of Massine v de Basil[17], Massine sought a declaration of copyright ownership over his own choreographic works. However, the jury ruled that de Basil, as Massine's employer, owned the ballets created between 1932 and 1937 under the Copyright Act of 1911. This decision highlighted the challenges choreographers faced in asserting ownership of their works, particularly when created in the course of employment.

In contrast, the evolution of copyright protection for choreographic works in the United States (U.S.) followed a different trajectory. Initially, U.S. copyright protection was limited to maps, books, and charts. Over time, other creative works were added, such as musical compositions in 1831, photographs in 1865, and paintings, drawings, and sculptures in 1870[18]. However, choreography remained largely unprotected until 1976, when the U.S. Copyright Act was amended to explicitly include choreographic works and pantomimes as categories of copyrightable subject matter. Section 102(a)(4) of the Act grants protection to choreographic works created after January 1, 1978, provided they are fixed in a tangible medium of expression.

For choreographic works published before January 1, 1978, choreographers could only obtain copyright protection by registering their work as a "dramatic composition". To qualify as such, the choreography needed to "tell a story, develop a character, or express a theme or emotion through specific dance movements and physical actions"[19]. This requirement underscored the challenges faced by choreographers in securing legal protection for their creative works prior to the 1976 amendments.

In Fuller v. Bemis[20], the Circuit Court of the Southern District of New York confirmed the strict requirements for what could be considered a dramatic composition under copyright law. The court defined a dramatic composition as a work where the action is not merely narrated or described but actively represented.

In 1892, Loïe Fuller, the renowned dancer known as the "mother of American modern dance" sought an injunction against Minnie Bemis for copyright infringement of her "serpentine dance".

17 Massine v. de Basil, 1938, 82 Sol Jo 173.

18 *The New York Times*. "The Copyright Law and Dance". In *The New York Times* [online], 11 January 1981.

19 *Ibid*.

20 *The Albany Law Journal*. "The Serpentine Dance, by Marie Louise Fuller". *The Albany Law Journal*, vol. 46, 1892, pp. 165-166.

Figure 1. Loïe Fuller photographed by Isaiah West Taber, 1897.

Source: *L'Historie par l'Image*[21].

Fuller had registered the choreography with a detailed description, but the court ruled against her, finding that the dance was merely a series of graceful movements combined with drapery, lights, and shadows. The court concluded that Fuller's dance did not constitute a dramatic composition because it did not tell a story, portray a character, or depict emotion, and thus denied her copyright protection.

Despite this early setback, the recognition of choreographic works under copyright law evolved over time. A significant turning point occurred in 1952 when the Copyright Office accepted Hanya Holm's choreography for the Broadway musical *Kiss Me Kate* as a dramatic work, even though it did not meet the traditional criteria of storytelling or character portrayal. This decision marked a shift in the office's approach, signaling a growing adaptability to the needs of the dance industry and an evolving understanding of what could be protected under copyright law.

Shifting our focus to the other side of the world, in 1993, the Andean Community made a significant stride in copyright law with the enactment of Decision 351, aimed at regulating copyright and related rights across its member states. This decision was seen as ambitious at the time, as it set protection levels comparable to the standards established by the TRIPS Agreement. Chapter II of Decision 351 explicitly includes choreographic works as protected under Article 4(e). This recognition required member states to adapt their national legislation to align with these common provisions, integrating the Decision into their domestic legal frameworks.

21 Isaiah West Taber. *Loïe Fuller dansant avec son voile* [Photo], 1897. In *L'Historie par l'Image*.

For instance, Colombia, a member of the Andean Community, had already established a foundation for protecting choreographic works with Law 23, enacted in 1982. This law, considered pioneering in the region, expressly mentions choreographic works as protectable under its Article 2. It categorizes these works as artistic, within the broader scope of copyright subject matter, which also includes scientific and literary works. Similarly, Peruvian legislation recognizes choreographic works as original manifestations of human creativity in the artistic field, as outlined in its Legislative Decree No. 822, Article 5.

These developments highlight a broader trend where countries with a closed-list approach to copyright, despite having a seemingly exhaustive list of protected categories, must still adhere to international standards like those set by the Berne Convention. This convention mandates the recognition of all forms of artistic and literary works as copyrightable subject matter. Ultimately, the interpretation of what constitutes a protected work and the threshold for copyright protection will be determined by the courts and the specificities of national legislation. This ongoing evolution reflects the dynamic nature of copyright law as it adapts to encompass new and emerging forms of artistic expression.

III. REQUIREMENTS FOR PROTECTION

Article 5(2) of the Berne Convention explicitly states that formal registration is not required for copyright protection, establishing automatic protection as a fundamental principle of the Convention. This means that creators do not need to register their works to receive protection; the mere act of creation is enough to secure their rights.

The Berne Convention grants member states the authority to define what constitutes a *work* and to establish the criteria for determining authorship. However, the Convention provides limited guidance on how these assessments should be made. For instance, Article 2(6) declares that "protection shall operate for the benefit of the author and his successors in title", implicitly referring to natural persons as the creators. Moreover, Article 15(1) specifies that in order for someone to be recognized as an author and to enforce their protected rights, their name must appear on the work. Thus, the Convention makes it clear that human authorship is a prerequisite for copyright protection; without human authorship, a work cannot be protected under the Berne Convention.

While the Convention does not explicitly define the term *work* it can be inferred from Article 2(1) that it encompasses all original works in the literary, scientific, and artistic fields. This broad interpretation allows for a wide range of creative expressions to be protected, provided they meet the necessary criteria.

The specific requirements that literary and artistic works must satisfy to qualify for copyright protection are governed by national laws. Nevertheless, all signatories to the Berne Convention agree on a fundamental point: the subject matter must

be an original work created by a human being. This shared understanding forms the foundation of international copyright law, ensuring that creators' rights are recognized and protected across different jurisdictions.

A. Originality

Originality is a cornerstone of copyright protection across the globe. Despite its fundamental importance, the concept of originality remains ambiguous and is subject to varied interpretations depending on the jurisdiction. While the Berne Convention establishes minimum standards for copyright protection, it provides limited guidance on how originality should be assessed. For instance, Article 2(3) differentiates between original works and adaptations or translations, and Article 14 bis (1) asserts that cinematographic works are protected as "original works" without affecting the copyright status of any underlying adaptations or reproductions.

Despite the widespread agreement on the necessity of originality for copyright protection, the standards for assessing it differ significantly from one jurisdiction to another. This divergence in standards reflects the broader challenge of defining what constitutes originality in a meaningful way.

In the land of choreographic works, this challenge is particularly evident. Although choreography often draws inspiration from previous works, it must meet specific criteria to qualify as original. For example, isolated steps on their own are not eligible for copyright protection, as they are considered mere ideas rather than original expressions. Instead, choreographic works must involve a distinctive combination of steps and elements. A 1961 report by the United States Congress on Copyright Law Revision highlighted that simple and stereotyped bodily movements lack significant creative authorship and, therefore, do not meet the threshold of originality[22].

To evaluate originality, the choreography must be assessed in its entirety. This means considering not just the sequence of steps but also additional elements that contribute to the work's originality. Factors such as the formation of the dancers, the spatial arrangement, costumes, scenery, and lighting effects all play a role in defining the uniqueness of the choreographic work. Thus, while the notion of originality is universally recognized as essential for copyright protection, its interpretation varies, requiring a comprehensive approach to evaluating the creative contribution of choreographic works.

22 United States Congress Senate Committee on the Judiciary. Subcommittee on Patents, Trademarks, and Copyrights. *Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate*, Eighty-Sixth Congress, 1st Session [Second Session]. US Government Printing Office, 1960.

1. Standards to determine originality

a. European Union

In the European Union, originality in copyright law is defined by the criterion of "the author's own intellectual creation" as specified in the Database Directive[23]; the Computer programs Directive[24]; the Term Directive[25] and recently in the Digital Single Market Directive[26]. This criterion was established in the landmark case *Infopaq International A/S v Danske Dagblades Forening*[27] and necessitates that a work must reflect the author's personal touch and intellectual effort to be eligible for protection. The *Infopaq* decision established the "author's own intellectual creation" as a uniform standard for determining copyright protection, thus harmonizing the originality requirement across the EU, that was later incorporated under the Information Society Directive[28]. Nevertheless, the application of this threshold may vary from one jurisdiction to another.

In the case of *Eva-Marie Painer v Standard Verlags GmbH*[29], the Court elaborated on this requirement by explaining that a work reflects the author's personality if it displays a unique "personal touch" resulting from the author's creative choices. This reflection is achieved if the author expresses its creative abilities in the work by making free choices, and subsequently "by making those various choices, the author […] can stamp the work created with his personal touch". As such, this decision equated the "personal touch" to "author's own intellectual creation" from Infopaq.

The Eva-Marie Painer case is crucial in terms of the originality of choreographic works, as it tested the aforementioned originality threshold on photographs, specifically a portrait photograph taken by Ms. Painer. Given the inherent limitations on creative freedom in such works, the case raised the question of whether the portrait photograph was protected under the Term Directive.

Choreography, akin to photography, often incorporates pre-existing elements, such as steps derived from predecessors, similar styles, scenarios, or routine poses. This parallel suggests that the mere inclusion of pre-existing elements does not

23 Directive 96/9/EC of the European Parliament and of the Council on Legal Protection of Databases, 2004, OJ L77/20, Article 3 (1).

24 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, 2009, OJ L111/16, Article 1(3).

25 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2006, OJ L372/12, Article 6.

26 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019, OJ L130/92, Article 14.

27 Infopaq International A/S v Danske Dagblades Forening, 2009, Case C-5/08.

28 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001, OJ L167/10.

29 Eva-Marie Painer v Standard Verlags GmbH, 2011, Case C-145/10.

preclude the author's ability to make creative choices and imprint a personal touch on their work.

The case of *Levola Hengelo*[30] further refined the concept of a *work* under EU law. Although the preceding cases expanded the meaning and scope of originality, neither the Directives nor the Berne Convention defined the concept of *work*. As a result, the concept of *work* became slightly entwined with the concept of *originality* given that only something that is the expression of the author's own intellectual creation may be classified as a *work*. Nevertheless, the Court emphasized that "the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form"[31]. This principle also applies to choreographic works, which must be identifiable by others, even if not fixed.

In the Spanish case *Miguel Ángel Perera Díaz*[32], the Supreme Court examined the copyrightability of the "*faena*", a traditional Spanish bullfight. While acknowledging that a bullfight could be considered original, the Court determined that it did not meet the precision and objectivity required to be classified as a *work* under EU law.

Miguel Ángel Perera Díaz, a famous "matador", filed an appeal with the Supreme Court against the refusal of registration for a bullfight that took place in 2014, alleging a violation of Spanish Copyright Law. The Supreme Court denied copyright protection for a bullfight, citing the Infopaq case's originality threshold and the definition of *work* adopted in Levola Hengelo. In particular, the Court stated that "each 'matador' does his own bullfight, that is the result of his creative and expressive capacity, where physical, social and intellectual factors are combined"[33]. But later, the Court concluded that "in the work of a bullfighter, […] it is very difficult to objectively identify the original artistic creation"[34].

The Spanish Court thus examined that bullfights may contain creative sequences of moves that reflect the author ("matador") own intellectual creation, but those moves are not identifiable with sufficient precision and objectivity in order to be reproduced. Hence, as per the Levola Hengelo test, those sequences of moves cannot qualify as a work or choreographic works. Interestingly, the Court suggested that replicability was a feature derived from the precision and objectivity, despite the fact that this was not even mentioned in Levola Hengelo case.

30 Levola Hengelo BV v Smilde Foods BV, 2018, Case C-310/17.

31 *Ibid.*, Para. 40.

32 Tribunal Supremo [España], Sala de lo Civil. Sentencia núm. 82/2021, Casación e Infracción Procesal Núm. 1443/2018.

33 *Ibid.*, Para. 5: "[…] cada torero hace su toreo y este es fruto de su capacidad creativa y expresiva, donde se conjugan factores físicos, sociales e intelectuales".

34 *Ibid.*, Para. 8: "[…] en la faena de un torero, […] resulta muy difícil identificar de forma objetiva en qué consistiría la creación artística original".

b. United Kingdom

The British copyright regime differs from the European approach. The criteria of originality are explicitly mentioned only for certain works, namely literary, music, dramatic and artistic works[35].

The traditional UK standard for originality was defined in *Walter v Lane*[36], where a work was considered original if it resulted from the author's "labour, skill, or effort". However, this standard was historically viewed as low since it is complicated to determine if all levels of skill and labour constitute originality. The case of *Interlego v Tyco*[37] narrowed this scope by establishing that originality requires more than mere effort; it must also involve avoiding slavish copying. Therefore, "skill, judgment or labor merely in the process of copying cannot confer originality". Originality, thus, must consider not only the author's "labor, skill, or effort" but also that the work is not copied.

In *Hyperion Records v Sawkins*[38], the Court distinguished between slavish copies and works demonstrating originality through significant skill and effort, redefining the threshold of originality. To this extent, and in relation to the protection of choreographic works, dances that are slavish copies would lack significant effort in their creation and would thus be unprotected.

With the adoption of the "author's own intellectual creation" standard from EU law following *Infopaq*, UK copyright law aligned more closely with European norms. However, Brexit introduces the potential for divergence, as the UK might revert to its traditional standards. Despite this, the "author's own intellectual creation" criterion has been incorporated into UK case law, as evidenced in *Meltwater*[39], where the High Court held that the defendant's short extracts of newspaper articles could infringe copyright, if these amount to an expression of the intellectual creation of the author.

c. United States

The U.S. Supreme Court clarified the originality requirement in *Feist Publications, Inc. v. Rural Telephone Service Company*[40], establishing that a "modicum of creativity" is sufficient for copyright protection. This standard is relatively lenient, emphasizing that most works meet the threshold if they possess some degree of creativity. For example, the U.S. Copyright Office recently denied protection to the "Carlton Dance" created by actor Alfonso Ribeiro during the filming of the TV series *The*

35 The Copyright, Designs and Patents Act 1988, Article 1(1)(a).
36 Walter v Lane, 1900, AC 539.
37 Interlego v Tyco, 1989, AC 217.
38 Hyperion Records v. Sawkins, 2005, EWCA Civ 565.
39 Newspaper Licensing Agency Ltd. and others v. Meltwater Holding BV and others, 2011, EWCA 890 Civ, 2012, RPC 1.
40 Feist Publications, Inc. v. Rural Telephone Service Company, 1991, 499 U.S. 340.

Fresh Prince of Bel-Air. The Office held that the work submitted was a simple dance routine composed of three dance steps that lacked originality and could not be registered.

By way of analogy, these three dance steps can be considered as words. Words *per se* are not eligible for copyright protection; irrespective of the number of times a word is repeated, it will not be copyrightable. In this case, Mr. Ribeiro can repeat the three dance steps indefinitely, and they will still constitute a simple dance routine rather than a choreographic work. Nevertheless, an alternative perspective may argue that even if the individual movements are considered simple, the arrangement created by Mr. Ribeiro should be regarded as a choreographic work, which was indeed the position of Mr. Ribeiro's lawyer.

In light of the above, it is possible to conclude that although the U.S. "modicum of creativity" doctrine sets a low bar, it is the effort of the author in expressing creativity through the work that defines eligibility for protection. Consequently, the effort must demonstrate a sufficient amount of intellectual creativity in the creation of the work. This has implications for choreographic works, where the arrangement of basic movements might be seen as insufficient for copyright protection if deemed too simple.

d. Canada

In Canada, originality requires more than trivial or mechanical effort. The case of *CCH Canadian Ltd. v. Law Society of Upper Canada*[41] highlighted that while minimal creativity is not sufficient, originality must stem from a genuine exercise of skill and judgment. The Canadian Court agreed with the U.S. assessment of the "sweat of the brow" considering it as very low threshold. Nevertheless, they rejected the "minimal degree of creativity" stated in Feist Publications Inc. v. Rural Telephone Service, as creativity is not required to make a work original. Instead, an original work as per Canadian legislation must be the product of an exercise of skill and judgment where "skill" is "the use of one's knowledge, developed aptitude or practiced ability in producing the work"[42] and "judgment" is "the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work"[43].

Thus, in relation with choreographic works, the Canadian Courts assess whether the choreographer has exercised such skill and judgment that goes beyond the mere mechanical effort. However, the big question would then be how to assess the degree of skill and judgment required for a dance to be protected, that goes beyond merely a mechanical effort. Although Canadian Courts have

41 CCH Canadian Ltd v Law Society of Upper Canada, 2004, 1 SCR 339.
42 *Ibid.*, Para. 16.
43 *Ibid.*

not officially decided about it, Pastor v Chen[44] set a precedent that suggests the possibility of considering dance routines original, which usually do not qualify *per se* for copyright protection.

In this case, "Mr. Pastor, a dance instructor, and choreographer brought a claim against his former pupil for teaching and performing his specific choreographed version of a form of Salsa called La Rueda"[45]. Mr. Chem, the defendant, based his argument on the fact that "La Rueda" is type of salsa round dance whose movements could be seen in videos that are in the public domain. However, Mr. Pastor had filed a copyright application for his own version of "La Rueda" called "The Wheel of the World" and also provided the Court with evidence of his authorship of the individual dance moves performed in the dance.

When assessing the originality, the Court found that Mr. Pastor proved that these uniquely choreographed moves and dance styles were his invention and properly covered by copyright[46], stating: "(…) the Claimant's moves and dance styles have a 'significant element of originality, not already in the realm of public knowledge,' and certainly could not be *found in garden variety instructional videos which demonstrate rather basic steps for mere novices*"[47]. Nevertheless, the decision did not specify whether Mr. Pastor's individual dance moves or the dance as a whole were protected by copyright.

The case was ultimately decided on a breach of confidentiality rather than copyright infringement, despite the fact that Mr. Chen did not teach the general elements and moves of "La Rueda" but rather the specific choreographed moves created by Mr. Pastor.

The court found that Mr. Pastor's specific choreographed moves, though based on a general style, exhibited significant originality beyond basic instructional routines, supporting the possibility of copyright protection.

To summarize, there exist four distinct traditions to determine originality. These are the European standard based on the "author's own intellectual creation", which actually inspired different civil law systems in Latin-America; the British one that sets the "skill and labour" approach; the U.S. standard of a "minimal degree of creativity"; and finally, the Canadian threshold of "non-mechanical and non-trivial exercise of skill and judgment".

B. Fixation of the Dance in a Tangible Medium

The requirements for obtaining copyright protection vary significantly based on the legal traditions of different countries. In common-law jurisdictions, such as the U.S., UK, India, and Australia, a fixation requirement is generally imposed.

44 Pastor v. Chen, 2002, BCPC 169.

45 Gowling WLG. "So you think you can dance? Copyright protection of dance moves". In: *Gowling WLG* [online], 12 de mazo de 2019.

46 Pastor v Chen, *op. cit.*

47 *Ibid.*

In contrast, civil-law countries, including most European nations, the Andean Community, and some Asian countries, provide protection regardless of whether the work has been fixed. Consequently, in civil-law systems, copyright protection may arise either at the time of creation or upon fixation.

Under the Berne Convention, member states have the discretion to decide whether fixation is a requirement for copyright protection. However, fixation should not be considered a formality, as it is primarily for administrative purposes, such as the registration of titles.

In the United States, the Copyright Office defines the fixation requirement for choreography as the necessity to document the movements in sufficient detail to enable the performance of the work in a consistent and uniform manner[48]. This implies that there is no predetermined method for fixation; the medium can vary as long as it allows the choreographer to record the work and enables others to perform it. Consequently, merely teaching dance moves does not meet the fixation requirement. For a choreography to qualify for copyright protection, it must be fixed in a visually perceptible form. Works that are not fixed are not protected under the U.S. Copyright Act and cannot be registered, although they may still be protected under state law. Traditionally accepted methods of fixation include video recording, textual description, photographs, drawings, computer animation, and dance notation.

In the case of Academy of General Education, Manipal v. Malini Mallya[49] the Supreme Court of India addressed the issue of whether a dance form described in literary terms could be treated as a dramatic form of choreography. The Court ruled that a new ballet described in a literary format should be considered a dramatic work, provided that the description is detailed enough to serve as performance instructions. This decision indicates that there is no specific legal standard for satisfying the material form requirement, as long as the description is sufficiently detailed.

Under English law, choreographic works can also be fixed in writing or other forms[50]. No specific action or registration formality is required for copyright to subsist; once a choreographic work is fixed in a permanent form, it automatically receives protection. Thus, mere public performance of a choreography does not suffice for protection, as it does not constitute a permanent representation of the work. However, this requirement has been contested by choreographers, who argue that the ephemeral nature of dance makes it challenging to capture due to constraints of space and time, which are not always easily documented. Others

48 The United States Copyright Office. *Circular 52. Copyright Registration of Choreography and Pantomime*. The United States Copyright Office, 2017.

49 Academy of General Education, Manipal and Others. v B. Malini Mallya, MANU/SC/0146/2009.

50 The Copyright, Designs and Patents Act 1988, S 3(2) (UK).

suggest that dance is fixed in the "memories and bodies of the dancers" treating the body as a material object[51].

Despite these arguments, current English law does not accept this perspective. For instance, in Merchandising v Harpbond[52], the Court rejected the notion of protecting the makeup of English musician Adam Ant as a copyrightable subject because it was not fixed to a surface but painted on his face, making it washable. The same logic could be applied to dance, where the body, considered a medium, must eventually cease performing the choreographic work and is not permanently fixed.

There is a nuanced distinction between the medium of fixation and the work itself.

> The work is incorporeal. Fixation is the threshold which all works must cross to qualify for copyright protection in those countries that require fixation, but once across, the work exists independently of any particular material object in which it may be concretized[53].

Therefore, the choreographic work itself should not be conflated with its film or literary description. Conversely, in countries with legal systems based on civil law tradition, copyright protection begins from the moment of creation, and no formal process is necessary to obtain it.

To date, questions regarding the protection of choreographic works or the requirements for a dance to be considered copyrightable have not been addressed by the Court of Justice of the European Union (CJEU). This suggests that the topic is not frequently discussed among judges or within the dance community and is nearly absent from the legal discourse.

While the Berne Convention permits member states to determine whether to impose a fixation requirement[54], this flexibility can pose challenges for international enforcement. For example, in civil-law countries without a fixation requirement, oral works and unfixed dances might be protected, whereas common-law countries generally do not offer protection without fixation.

51 Martha M. Traylor. "Choreography, Pantomime and the Copyright Revision Act of 1976". *New England Law Review*, vol. 16, 1981, pp. 227 ss., at 237.

52 Merchandising v Harpbond, 1983, FSR 32.

53 Jane Ginsburg. "Overview of Copyright Law". In Rochelle Dreyfuss and Justine Pila (Eds.), *Oxford Handbook of Intellectual Property Law*. Oxford University Press, 2017; Columbia Public Law Research Paper No. 14-518, 2016.

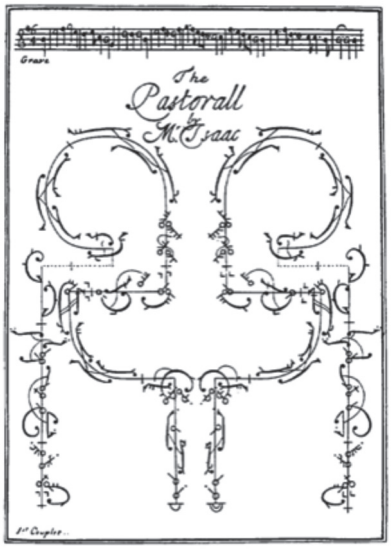
54 Berne Convention for the Protection of Literary and Artistic Works, 1979, Art 2(2): "It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form".

1. Forms of fixation

Dance notation serves as a symbolic representation of dance movements, utilizing various methods such as graphic symbols, path mapping, numerical systems, and descriptive words. These notation systems are designed to capture the precise movements of a dancer performing a choreographic work. Among these systems, "Labanotation" developed by Rudolf von Laban, is particularly renowned. It employs abstract symbols to define the direction, level, and duration of movements, as well as the specific body parts involved. However, multiple notation systems exist, each tailored to different dance styles and documentation needs.

The origins of dance notation systems can be traced back to the Renaissance era. An early example of a notation system was discovered in Spain, where signs were used to represent letter abbreviations for five well-known steps: R for révérence, s for simple, d for double, b for branle, and r for reprise[55]. The Baroque period marked a significant advancement in notation systems with the development of the first widely used dance notation system. This system, created by the eminent ballet professor Pierre Beauchamp, was published by his student, Raoul-Auger Feuillet, in *Chorégraphie ; ou, l´art de décrire la danse* in 1700[56]. This system consisted of traced patterns and steps on the floor to indicate pathways during Court dances.

Figure 2. Chorégraphie ; ou, l´art de décrire la danse.



Source: Encyclopaedia Britannica[57].

55 "Dance Notation". In *Encyclopaedia Britannica* [online].
56 *Ibid*.
57 *Ibid*.

While dance notation is instrumental in fixing a choreographic work, the notation system itself is generally not subject to copyright protection. This is because notation systems are tools for documenting dance rather than creative works *per se*.

Other methods of fixation include motion pictures, videotapes, and various forms of audiovisual recordings. These media can capture choreographic works, but they present unique challenges. Such recordings often depict only a single performance of the choreography, which may include additional interpretive elements like facial expressions, costumes, and set designs. This raises several issues: i) Whether the interpretation deviates from the choreographer's original creation by incorporating such elements; ii) Whether the choreographer and the dancer should be considered joint authors; and iii) Whether these interpretive elements are necessary for determining unauthorized reproductions of the work.

Choreographic works may also be fixed through textual descriptions, photographs, drawings, or a combination of these methods, provided the documentation is sufficiently detailed to serve as performance directions. For instance, in Horgan v. Macmillan, Inc[58], the District Court of New York addressed whether photographs of ballet could infringe on copyright. Barbara Horgan sought to prevent the publication of a book titled *The Nutcracker: A Story a Ballet* by the British publishing company Macmillan. This book featured photographs of dancers performing choreography by George Balanchine, the renowned Georgian-American ballet choreographer and former Artistic Director of the New York City Ballet.

The court ruled that still photographs could not infringe Balanchine's copyright because the original choreography could not be fully recreated from the photographs. Thus, the book did not infringe on Balanchine's copyright, as choreography, being a dynamic sequence of steps, could not be entirely captured through static images[59].

In conclusion, mere photographs are not sufficient as a form of fixation for choreography. However, combinations of fixation methods, such as merging textual descriptions, photographs, and notations, are allowed, as they collectively serve as directions for the performance of the choreographic work.

IV. COPYRIGHTABLE DANCE WORKS

A. Definition of Choreographic Work

The *Cambridge Dictionary* defines *dance* as "a particular series of movements that you perform to music or the type of music that is connected with it"[60]. Thus, dance is classified as a performance art. Similarly, choreography is defined as "the

58 Horgan v MacMillan, Inc, 1986, 789 F.2d 157.
59 *Ibid*.
60 "Dance". In: *Cambridge Dictionary* [online], 18 December 2019.

skill of combining movements into dances to be performed"[61]. This skill involves designing the structure of a dance by specifying human movement in terms of space, shape, time, and energy. Consequently, choreographic works are considered artistic creations and are protected by copyright as original works of authorship.

Dance involves rhythmic body movements, which may or may not be choreographed. Regardless, all forms of dance incorporate five essential elements: body, action, space, time, and energy. The body, as the dancer's primary instrument, may be used in its entirety or only certain parts, performing actions within a defined space, to the rhythm of music, and employing various techniques to create a desired aesthetic effect[62].

The distinction between what is protectable and what is not is often subtle. The determination of copyright protection depends on national law, provided that signatories to the Berne Convention adhere to its minimum standards. While countries may extend protection beyond these standards, they must not fall below the Convention's minimum requirements. However, most legal systems agree that individual dance moves, social dances, or simple routines are generally not eligible for copyright protection.

According to the US Copyright Office, "choreography is the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole"[63]. Furthermore, it has been established that choreographies share common elements. Although these elements need not be present simultaneously, they collectively contribute to the identification of a work as a choreography. These elements include: i) rhythmic movements of one or more dancers' bodies in a defined sequence and spatial environment, such as a stage; ii) a series of dance movements or patterns organized into an integrated, coherent, and expressive compositional whole; iii) a story, theme, or abstract composition conveyed through movement; iv) a presentation before an audience; v) a performance by skilled individuals; and vi) musical or textual accompaniment.

In Peru, the Copyright Office has attempted to define choreographic works by integrating definitions from The Royal Spanish Academy (RAE) to obtain a broader concept. The RAE defines choreography as the "art of composing dances" and also as the art "of representing a dance on paper by means of signs, as a song is represented by means of notes"[64]. The Peruvian Copyright Office has adopted a broader definition, stating that choreography is both "the art of creating and representing structures in which organized movements take place, with a specific meaning and objective to signify something previously conceptualized"[65]. This

61 "Choreography". In *Cambridge Dictionary* [online], 24 August 2022.

62 MasterClass. "History of Dance: Universal Elements and Types of Dance". In: *MasterClass, Articles* [online], 19 November 2021.

63 The United States Copyright Office, *Circular 52. Copyright Registration of Choreography and Pantomime*, *op. cit.*

64 *Ibid.*

65 Erick Iriarte Ahón and Ruddy Medina Plasencia. *Guía de derecho de autor para*

definition includes key characteristics for identifying a protected choreographic work: i) it must result from artistic creation; ii) it must consist of a series of organized movements that convey meaning; and iii) it must represent a concept initially defined.

Thus, choreography has been commonly understood as the art of dance, including steps that are put together for a performance. Conversely, from a legal perspective "choreography is the composition and arrangement of dance movements and patterns, and dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationship"[66]. In this regard, it is likely to conclude that not all dances are protectable under copyright but only those that fall within the definition of choreography.

B. Dances not protected by Copyright

As previously discussed, not all dances are eligible for copyright protection. Certain categories of dance and movements fall outside the scope of copyright law, even if they are deemed creative or artistic by societal standards.

1. Individual Steps

Individual movements, such as basic steps of a particular dance, celebratory dance moves, or athletic victory gestures, are generally not copyrightable. For example, the U.S. Copyright Office explicitly states in Circular 52 that short dance routines consisting of only a few movements or steps, particularly those with minimal linear or spatial variations, cannot be registered.

In the European Union, the situation is more complex due to a lack of harmonization in the scope and boundaries of protection requirements. This discrepancy has led to varying approaches among member states. In some countries, domestic laws might permit the protection of individual dance moves if they meet specific criteria.

Globally, most jurisdictions agree that generic dance steps cannot be protected under copyright law. Granting such protection would risk monopolizing common movements used in everyday activities. However, some jurisdictions may recognize exceptions for steps that are deemed sufficiently creative and complex to warrant copyright protection.

coreógrafos. Instituto Nacional de la Defensa de la Competencia y la Propiedad Intelectual (Indecopi); United States Agency for International Development (USAID), 2013.

66 Laurent Carrière. *Choreography and Copyright: Some Comments on Choreographic Works as Newly Defined in The Canadian Copyright Act*. Montreal: Leger Robic Richard, Lawyers, 2003.

2. Social Dances and Simple Routines

Dancing has traditionally had a social connotation. Over time, it has evolved to include performances in front of audiences for entertainment. In many cases, however, the participants themselves are the ones performing the steps for their own enjoyment. Lawmakers worldwide recognize this reality, and as a result, social dance steps and simple routines are generally not considered choreographic works eligible for copyright protection.

In the U.S., for instance, the identity of the performers is a key factor in distinguishing choreographic works from social dances[67]. Registrable choreographic works are typically intended to be performed by skilled dancers before an audience. In contrast, social dances are meant to be performed by the general public and are thus deemed uncopyrightable. For example, a dance in which a group of people follow a repeating sequence of steps while arranged in rows would likely be rejected for copyright protection.

The aforementioned indicates that the skilled dancer plays a significant role in the definition of choreographic works, at least for the United States. The first question this raises is whether or not dance sequences created and performed by ordinary people, such as popular social media trends, are copyrightable. The point is still debatable, and it would be up to the judges to decide while taking into account other copyright protection requirements.

In an interview for Dance Informa[68], Terrica Carrington, VP, Legal Policy and Copyright Counsel at Copyright Alliance in the United States stated:

> There are a lot of people today who are calling themselves choreographers who, five and 10 years ago, wouldn't have been calling themselves that. It's very easy to make up a dance and put it online. So people are wanting to know what's the distinction between, "I made a 30-second video and put it on Instagram" versus a choreographer who is actually choreographing for the stage or choreographing for a video or something like that?

In contrast, representatives from Canada and Australia stated in the same interview that in their jurisdictions, copyright would be granted to anyone who creates a choreographic work, as the dance itself must meet copyright thresholds, regardless of the creator's professional status.

Another important question is whether social dances should be protected simply because they were created by a skilled choreographer. For example, *The Electric Slide*, a four-wall line dance created in 1976 and published in 1994 by Ric Silver,

67 The United States Copyright Office, *Circular 52. Copyright Registration of Choreography and Pantomime*, *op. cit.*

68 Rick Tjia. "Copyright for Choreography: What you need to know". In: *Dance Informa Magazine* [online], 4 May 2021.

a choreographer, pianist, and Broadway performer, is a twenty-two-step dance routine commonly performed by regular people at social gatherings. Although it was created by a professional, it perfectly fits the definition of a social dance. In fact, Marybeth Peters, the former U.S. Registrar of Copyrights, once determined that the "Electric Slide" is a social dance rather than a choreographic work. She argued that social dances are not protected because they are generally too simple to be considered creative works and that enforcing copyright for such dances would be nearly impossible, given the difficulty of policing all individuals who perform a dance they did not create.

3. Athletic Moves

The question of whether a sequence of exercises can be copyrighted has been a topic of considerable debate in courts and copyright offices worldwide. The recognition of Intellectual Property (IP) as a means to protect commercial interests across various fields has gained importance internationally, and the fitness industry is no exception. Within this context, athletic moves and routines performed in sports or physical activities, which are considered unique in their respective fields, contribute significantly to the commercial value of those activities.

According to the *Compendium of U.S. Copyright Office Practices*[69], fitness choreography is not eligible for copyright protection. Specifically, "a work may be precluded from registration as a functional system or process if the particular movements and the order in which they are performed purportedly improve one's health or physical or mental condition". Thus, in the U.S., functional physical movements, such as exercise routines, aerobic dances, or even yoga positions, are not registrable. Additionally, ordinary motor activities, competitive events, and feats of skill or dexterity are also excluded from copyright protection.

A notable case in this context is Bikram's Yoga College v. Evolation Yoga[70] (2015), in which Bikram Choudhury, a yoga guru, sought copyright protection for a sequence of yoga poses. The key issue was whether the sequence of twenty-six yoga poses and two breathing exercises, developed by Choudhury and described in his 1979 book *Bikram's Beginning Yoga Class*, qualified for copyright protection. The court ruled unfavorably for Choudhury, holding that under 17 U.S.C. § 102(b), the sequence was an idea, process, or system designed to improve health, rather than an expression of an idea. Consequently, it was ineligible for copyright protection as a choreographic work.

Similarly, the series of movements used in Zumba would not qualify for copyright protection. Although Zumba, a popular fitness program involving cardio

69 *Compendium of U.S. Copyright Office Practices*, Chapter 800, Section 805.5 (B) (3): "'Functional physical movements' and 'ordinary motor activities'—in and of themselves—do not represent the type of authorship that Congress intended to protect as choreography".

70 Bikram's Yoga College v Evolation Yoga, Case No. 13-55763, 9th Cir., Oct. 8, 2015.

and Latin-inspired dance, includes rhythmic movements performed by skilled instructors, its primary purpose is to improve physical fitness. Copyright protection, therefore, may only be granted if exercise routines are filmed or described, such as in a compilation of photographs of the routine's individual movements. In such cases, copyright would protect the film or photographs themselves, rather than the exercise routine.

National laws vary in their approach to copyrighting athletic moves. For example, in 2007, the Higher Regional Court of Cologne in Germany ruled that under Sec. 2 para. 1 No. 3 of the German Copyright Act, it is possible to protect an acrobatic dance performance[71]. However, the performance must go beyond a mere sequence of physical movements and manifest a unique artistic expression. Given that German copyright law requires simple routines to constitute personal intellectual creations[72], copyright protection can only be granted if the acrobatic performance includes a creative dance element that imparts an overall artistic quality beyond mere acrobatics.

The situation is different in countries with a closed list of copyrightable categories, such as the United Kingdom. Athletic routines do not fall under any of the categories listed in the British Copyright Act. While the Act includes dance and mimes in its definition of dramatic works, athletic routines are typically not considered "dramatic", even if they incorporate dancing and miming. The Court of Appeal has emphasized that the term "dramatic work" should be interpreted according to its natural and ordinary meaning, although it remains unclear whether this meaning is contingent on the artistic merit of the work.

A similar situation exists in India, where the Copyright Act of 1957 enumerates only six types of works eligible for copyright protection, including choreography as a dramatic work, but excluding functional movements regardless of their technical execution. For instance, in Institute for Inner Studies v. Charlotte Anderson[73], the Delhi High Court ruled that a single yoga posture, or "asana", could not be copyrighted, as these postures are considered ancient techniques in the public domain. The Philippines-based Institute for Inner Studies had claimed that the pranic healing technique developed by its founder, Master Choa Kok Sui, was a choreographic work and, therefore, copyrightable as a "dramatic work"[74] under Section 13(a) of the Copyright Act, 1957. However, the Court interpreted the definition of "dramatic work" narrowly, concluding that "asanas" could not be classified as such, as they are merely "daily routine exercises".

71 Higher Regional Court of Cologne, Case 6 U 117/06, 2007.

72 Urheberrechtsgesetz (UrhG), 1965, § 2, Para. 2. (DE).

73 Institute for Inner Studies & Ors. v Charlotte Anderson & Ors., 2014, CS(OS)--2252/2011.

74 Copyright Act 1957, Section 2(h) (IN).

4. Traditional Cultural Expressions

According to the World Intellectual Property Organization (WIPO), expressions of folklore may be considered forms in which traditional culture is expressed, including dances. These expressions are integral to the identity and heritage of various traditional communities worldwide and are typically passed down through generations, making their origins difficult to trace.

The protection of traditional expressions varies significantly depending on the jurisdiction and can sometimes be covered under copyright law. For example, India does not provide copyright protection for traditional folk dances. In India, dance is regarded as one of the most ancient cultural practices, serving not only as an art form but also as a means of worship. The Indian Constitution guarantees the right to freely practice worship, and dance as a form of worship allows individuals to exercise this right. The lack of significant case law regarding the copyright of traditional dance forms in India may be attributed to the perception of these forms as communal expressions of piety and cultural heritage, owned collectively by the community.

In contrast, South Korea has granted copyright protection to four traditional dances created by the renowned traditional dancer Ubong Lee Mae-bang: Samgomu (three-drum dance), Ogomu (five-drum dance), Daegamnori (a shamanic dance ceremony to appease ancestors), and Janggeommu (long sword dance)[75]. It was Ubong's descendants who applied for the protection and subsequently informed various organizations, institutions, and schools about restrictions on performing these dances. This action was perceived by several artists and dance organizations as a "privatization of traditional intangible cultural heritage". However, the Ubong family contended that the primary motivation for registering the dances was the "preservation of the original"[76]. Controversy surrounds whether these dances can be classified as creative works and whether Ubong is the sole creator. One perspective argues that these dances are modern adaptations of traditional dances, modified from traditional dance moves. The opposing perspective maintains that Ubong not only created the dances but that they are the creative result of collaborative efforts by the dancers who accompanied him. Jang Oak-joo, from a dance organization opposing this privatization, stated:

> Unlike music and art, which are completed through the creative ideas of an individual, traditional folk dance depends heavily on the community and the context in which it occurs. Therefore, it makes more sense to view such outcomes as joint collaborations rather than individual creations[77].

75 Yoo Joo-Hyun. "Copyright Battle Rocks Traditional Dance World: Debate Rages over Whether Certain Styles Belong to Artists or to the Culture". In: *Korea JoongAng Daily* [online], 13 January 2019.

76 *Ibid.*

77 *Ibid.*

In South Korean copyright law, dance falls under the general category of "theatre". However, attributing choreography is more challenging than attributing theatrical plays because choreography consists of a series of movements that are not easily or consistently recorded, requiring more complex methods of notation than those used in theatre. Consequently, suggestions have been made to amend copyright law to better define the scope of protections for dances. For example, Professor Hosin Lee from Hansung University in Seoul proposed, during his presentation *Dance Creation and Copyright* at the 122nd Special Lecture hosted by The Society of Dance History Records[78], the legal distinction of dance from theatre and the standardization of notation and recording techniques.

A primary issue with traditional dances is delineating the boundary between what is transmitted and what is created. Registering copyright for traditional dances may conflict with systems in some countries that emphasize the generational transmission of cultural traditions and mandate their teaching in schools. It is clear that copyright should not be granted in a way that restricts communities' rights to freely access their culture and folklore, including the ability to learn, perform, and transmit these cultural expressions.

5. Routines not Performed by Humans

While it may seem self-evident, in an era of advancing technology, it is crucial to emphasize that for choreography to be protectable under copyright law, it must be capable of being performed by humans. This means that routines designed for trained animals or inanimate objects, such as robots, are not eligible for copyright protection.

The case of Norowzian v Arks Limited[79] provides a relevant example, although it primarily dealt with the issue of whether a film could be protected as a dramatic work under copyright law. Mehdi Norowzian, a film artist, created a short film titled *Joy*, utilizing an editing technique known as "jump cutting". This technique involves splicing together film reels to make a dancer perform movements that could not realistically follow one another. The film was subsequently made available to the defendant's advertising agency as a "show reel" to showcase the artist's work. The agency later appeared to incorporate techniques from *Joy* in a film used in a Guinness Brewing Worldwide Ltd. advertisement called "Anticipation".

78 Jan Creutzenberg. "Can Tradition be Copyrighted? A Symposium on #dancecopyright. In: *Seoul Stages* [Blog], 5 April 2019.

79 Norowzian v Arks Limited (No. 2), 2000, FSR 363, 367.

FIGURE 3. *JOY* BY MEHDI NOROWZIAN

Source: *Campaign*[80].

Norowzian claimed copyright infringement, but the Court of Appeal ruled that while he held the copyright for the cinematographic work and had the right to complain if any substantial part of it was copied, most of the elements within the film did not, when separated from their specific context, enjoy copyright protection.

The court agreed that the work as a whole was protected, but the arbitrary sequence of the dancer's movements did not constitute a "dramatic work" because it was constructed using the jump-cutting technique and could not be performed in reality. It was impossible for any dancer to replicate the movements shown in the film.

In conclusion, under the Berne Convention, choreography as an original artistic work can be protected by copyright. However, the choreography, as a sequence of movements and steps, must meet the originality threshold in the jurisdiction where protection is claimed. The types of dances and routines discussed above may not meet the necessary standards to be considered original creations. Even if they do, they may sometimes conflict with other human rights, which must take precedence.

V. MORAL RIGHTS

Moral rights are a category of rights traditionally recognized in countries adhering to a civil law tradition and, to a lesser extent, in some common law jurisdictions. Internationally, these rights are acknowledged under Article 6 bis of the Berne Convention, which encompasses two main categories: paternity rights and integrity

80 *Campaign*. "History of advertising: No 148: Mehdi Norowzian's Joy" [Photo]. In: *Campaign*, 24 September 2015.

rights. The relevant clause states: "[…] shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation".

The fundamental rationale behind moral rights is to protect the non-economic values associated with a work. Unlike economic rights, which can be assigned or transferred, moral rights are generally non-assignable. However, certain jurisdictions, such as the United Kingdom, Canada, and the United States, permit authors to waive their moral rights.

Paternity rights refer to the entitlement to be publicly recognized as the author of a work and to prevent others from being incorrectly attributed as the creator. For choreographers, the accurate acknowledgment of their role in creating a series of dance steps is vital. This emphasis on proper credit is unsurprising given that choreographic works often embody the choreographer's distinctive personality and reflect their emotional and intellectual investment. As a result, the economic benefits derived from the work's exploitation are not the sole consideration for choreographers.

On the other hand, integrity rights grant authors the authority to prevent alterations to their works, ensuring that the work remains true to its original form. This right is particularly significant for choreographers due to its association with freedom of expression. Choreographers, who are both creators of new dance techniques and users of existing ones, must navigate a balance between exercising their creative freedom and respecting the integrity of prior works. Maintaining this balance is crucial to avoid undermining the original intent and reputation of earlier choreographers while contributing new and innovative expressions to the art form.

In Europe, according to Recital 19 of the InfoSoc Directive, moral rights fall outside its scope. These rights "should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty"[81]. Consequently, each Member State is responsible for recognizing and legislating these rights. However, discrepancies arise as some nations prioritize economic rights over moral rights and vice versa. Due to these variations, international agreements such as the TRIPS Agreement exclude moral rights from their purview, anticipating potential disagreements among member states.

In the United States, the approach to moral rights is notably distinct due to its utilitarian perspective on copyright[82]. Upon joining the Berne Convention in 1988,

81 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *op. cit.*, Recital 19.

82 "The utilitarian justification of copyright protection is, thus, premised on the fact that the copyright works are beneficial to society and their production should be

the U.S. agreed to recognize minimum rights for authors, including moral rights, but these are limited. Under the Visual Artists Rights Act (VARA)[83], moral rights are granted only to specific categories of works, namely visual arts (such as paintings, drawings, sculptures, and certain photographic images). As a result, choreographic works may fall outside the scope of moral rights protection in the U.S.

For instance, in Turner Entertainment Co. v Huston, CA[84], the case concerned the unauthorized colorization of a film. Although French law recognized the director's moral rights against distortion, the U.S. classification of films as "works made for hire"[85] means that authors generally do not enjoy moral rights unless they have contractually secured them. In the U.S., moral rights for other types of works may be recognized through specific contractual provisions, state laws, trademark laws, or derivative work rights, but no specific legislation explicitly recognizes these rights for choreographic works. Consequently, choreographers may have nothing left after transferring all exclusive economic rights to others.

In summary, U.S. law does not afford choreographers moral rights, and copyright holders of their works can modify or omit attribution to the original authors. However, parties may contractually agree to recognize moral rights based on the principle of *pacta sunt servanda* (agreements must be kept).

In contrast, the U.K., despite its common law tradition, provides moral rights for literary, dramatic, musical, artistic works, and films, as well as some performances. British copyright law recognizes four moral rights: attribution, integrity, the right to object to false attribution, and the right to privacy for certain photographs and films. Authors can also rely on common law rights or contractual rights as alternatives if statutory moral rights claims are ambiguous.

Globally, the approach to moral rights varies. In Australia, moral rights cannot be waived, but a choreographer may consent to omission of acknowledgment as a creator[86]. In Canada, while moral rights cannot be assigned, they can be waived contractually; such waivers are common in publishing contracts. The Andean Community, with its civil law tradition, provides robust personal protection for authors, including perpetual protection.

In conclusion, moral rights focus on the public perception of a work and ensuring proper credit for its use. However, due to the lack of international harmonization, the enforcement and recognition of these rights depend heavily on

encouraged". See Sadulla Karjiker. "Justifications for Copyright: The Economic Justification". *South African Intellectual Property Law Journal*, vol. 2, 2014, pp. 13-41.

83 17 U.S.C., § 106A.

84 Consorts Huston et autres c. Société Turner Entertainment Co. ; Syndicat Français des Artistes Interprètes et autres c. Société Turner Entertainment Co. et autres, Cass. Civ. 1e, 28 May 1991.

85 *Op. cit.* – VARA applies to works of visual arts and, 17 U.S.C. § 101 explicitly mentions that "works made for hire" are not considered as works of visual art.

86 Katherine Giles. "Shall We Dance: Dancing and Copyright Law. In: *Arts Law Centre of Australia*, 31 March 2005.

the jurisdiction in which the work is protected, reflecting the stance of the relevant legal system.

VI. LIMITATIONS AND EXCEPTIONS TO COPYRIGHT

A. Overprotection

Copyright protection aims to foster creativity by rewarding creative output. However, excessive copyright protection can lead to societal drawbacks, such as the "*boredom effect*" or a reduction in work diversity. This situation is analogous to the *tragedy of the anticommons* where excessive ownership can result in inefficient underuse of resources.

The term *overprotection* refers to protecting more than is necessary and is inherently relative. The ideal balance would be where protection aligns with competing freedoms[87]; however, exclusive rights can sometimes exceed this balance and infringe upon fundamental freedoms.

Overprotection in copyright can be observed in three key areas: the duration of protection, the number of categories of protected works, and the proliferation of rights and right holders. The term of copyright protection has lengthened over time, reflecting increased life expectancy and the extended period required to recoup the author's investment. Nevertheless, the duration has more than tripled since copyright law's inception, while life expectancy has only doubled. This disproportionate increase suggests that the extended term of copyright protection may not be fully justified.

Under the Berne Convention, the minimum term of protection is the life of the author plus 50 years, with specific exceptions. For applied art and photographic works, the minimum term is 25 years from the creation of the work[88]. For cinematographic works and anonymous or pseudonymous works, the term is 50 years from the work's lawful public disclosure[89], or if not disclosed, 50 years from the work's creation[90]. While these provisions set a minimum standard, member countries are free to extend these terms.

The scope of copyright has expanded to cover a broader range of works, adapting to new technologies. Traditionally, copyright development has been linked to technological advancements, yet the requirement of fixation in a tangible medium may need re-evaluation in light of intangible technologies. Furthermore, the numerous exclusive rights under copyright can be transferred or licensed to various

87 Martin Senftleben. "Overprotection and Protection Overlaps in Intellectual Property Law - the Need for Horizontal Fair Use Defences". In: Annette Kur and Vytautas Mizaras (Eds.), *The Structure of Intellectual Property Law* (Chapter 8). Cheltenham: Edward Elgar Publishing, 2011.

88 Berne Convention for the Protection of Literary and Artistic Works 1979, Art. 7 (4).

89 *Ibid.*, Art. 7 (3).

90 *Ibid.*, Art. 7 (2).

parties, potentially leading to fragmentation and high costs for users, which may result in underutilization of works.

Modern policies increasingly emphasize protecting copyright owners while restricting societal access and utilization of works. Excessive protection may result in cultural stagnation, where distinguishing when protection is necessary becomes challenging. For instance, seeking permission to perform choreographies for educational purposes or protecting an individual dance step for an extended period can become impractical.

Finding ways to strike a balance between protection and human rights is a high-priority debate in any legal framework. To provide a counterbalance, international treaties, national laws, and case law have established limitations and exceptions to copyright protection.

B. The role of limitations and exceptions

Copyright protection grants exclusive rights that are not absolute. Limitations and exceptions allow for the use of copyrighted works without the owner's authorization or compensation.

The Berne Convention has incorporated provisions for limitations and exceptions from its inception, allowing signatories to further define these in their national legislation. For example, Article 10(1) mandates an exception for quotations from a work, provided it aligns with fair practice. Additionally, Article 10(2) permits exceptions for the use of literary or artistic works for educational purposes, including illustrations in publications, broadcasts, or recordings.

Article 9(2) introduces the "Berne three-step test", which allows reproduction of works without authorization under specific conditions: i) the use must be for certain special cases; ii) it must not conflict with the normal exploitation of the work; and iii) it must not unreasonably prejudice the legitimate interests of the author.

Under this test, limitations on choreographers' exclusive rights would be permissible if the use does not conflict with normal exploitation and does not unreasonably harm the choreographer's interests. Such uses might include educational purposes, cultural or civil needs, consumer rights, freedom of expression, private or non-commercial use, and research. The TRIPS Agreement confirmed the use of this test[91], considering it as the general exception clause applicable to exclusive rights in copyright.

Some jurisdictions, such as those in Europe[92] and the Andean Community[93], have closed systems where exceptions are explicitly listed in the law. In contrast,

91 TRIPS Agreement, Article 13.

92 InfoSoc Directive, Article 5.

93 Decisión 351, "Régimen común sobre derecho de autor y derechos conexos", Capítulo VII, Artículo 21.

open systems, like the fair use doctrine in the U.S. (Section 107 U.S.C.), provide a non-exhaustive list of factors for determining fair use[94]. These factors include the purpose and character of the use, the nature of the work, the amount used, and the effect on the work's value.

> In all events, international norms require that national laws creating exceptions and limitations satisfy the "3-step test," set out in Article 9(2) of the Berne Convention with respect to the reproduction right, and reiterated in article 13 of the TRIPS Agreement and article 10 of the WIPO Copyright Treaty with respect to all rights under copyright[95].

In France, exceptions to copyright are explicitly listed, such as private copying, short quotations, or parody[96]. British law also sets exceptions for fair dealing, including research, private study, and criticism or review[97]. Although "fair dealing" is not explicitly defined, it requires that the use be reasonable, in an appropriate amount, and not negatively impact the market for the original work.

Fair dealing is also present in many common law jurisdictions. For instance, Indian law includes a list of exceptions but applies the "fair dealing" criteria, especially for personal use, criticism, review, and reporting current events. In Manipal and Anr. v. B. Malini Mallya, the Indian Supreme Court determined that a dance performance before a non-paying audience did not constitute infringement under the fair dealing provision[98].

Overall, the relationship between copyright law and fundamental rights remains complex. Each legal system must determine whether certain uses without permission constitute infringement. Fundamental freedoms have long influenced copyright systems worldwide, and choreographic works are no exception. Balancing the choreographer's freedom of expression with the public's use of their work is a challenging task for legislators and judges.

For example, parody as an exception is linked to the fundamental right of freedom of expression. In the European Union, parody as an exception is optional for Member States. Countries like France, Belgium, and the Netherlands explicitly allow parody under specific conditions. The case Deckmyn and Vrijheidsfonds[99]

94 Anne Lepage. "Overview of exceptions and limitations to copyright in the digital environment". In: *Unesco's e-Copyright Bulletin*, January-March 2003.

95 Jane Ginsburg, "Overview of Copyright Law", *op. cit.*

96 Intellectual Property Code, Article L122-5.

97 Copyright, Designs and Patents Act 1988, Sections 29, 30.

98 Academy of General Edu., Manipal and Ors. v B. Malini Mallya, MANU/SC/0146/2009, Paragraph 20: "When a fair dealing is made [...] of a literary or dramatic work for the purpose of private use including research and criticism or review, whether of that work or of any other work, the right in terms of the provisions of the said Act cannot be claimed. Thus, if some performance or dance is carried out within the purview of the said clause, the order of injunction shall not be applicable. Similarly, appellant being an educational institution, if the dance is performed [...] before a non-paying audience [...] the same would not constitute any violation".

99 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Other's, 2014, Case C - 201/13.

established a uniform definition of parody in European law, requiring that a parody evokes an existing work while being notably different and serves as an expression of humor or mockery[100]. However, to be in line with the freedom of expression, "humour", may refer to the intent to and not the effect caused thereof.

Finally, limitations generally require attribution to acknowledge the authorship of the work used. Non-attributed uses are considered copyright infringement under most laws, although the scope of this attribution is governed by the recognition of moral rights within each legal framework.

VII. CONCLUSION

Due to their abstract nature, choreographic works present more challenges for protection compared to traditional works such as writings or paintings. The difficulties associated with protecting choreography stem not only from inadequate legislation but also from the intrinsic nature of this artistic form.

The aim of this article was to determine whether all dances are eligible for copyright protection. Similar to other creative works, choreographic works must meet the requirement of originality to qualify for copyright protection. While the specific threshold for originality varies by jurisdiction, most agree that the work must represent the author's own intellectual creation and not merely be a copy. Given that some dance traditions exist in the public domain, this criterion is crucial for protecting new choreographic works. The fact that such dances are derived from existing intellectual work does not preclude choreographers from obtaining copyright protection for their own creative contributions.

Debates have also arisen regarding the necessity and reasonableness of the fixation requirement in jurisdictions that impose it. Indeed, one might argue that this requirement is incongruent with the conventional process of creating choreography. Typically, choreographers first perform their works on stage, and it is uncommon for them to compose notations before the performance. In fact, many choreographers are not proficient in reading or writing these notation systems, which adds an extra burden to the protection of their work.

Although no jurisdictions mandate that fixation occur simultaneously with the creation of the work, it is clear that protecting choreographic works is more complex compared to other types of creative works.

Despite the challenges associated with fixing dance in a permanent form, choreographic works can theoretically benefit from comprehensive copyright protection. However, these challenges have led to the marginalization of dance within copyright law. Consequently, there is a noticeable scarcity of case law globally concerning the protection of choreographic works.

100 *Ibid.*, Para. 20.

The exploitation of choreographic works through the audiovisual industry, particularly the internet, has expanded the market for choreographers and heightened awareness of the protection available for their creations. Nonetheless, the dance community continues to rely heavily on the support of companies that employ them, often prioritizing practical work arrangements over the pursuit of exclusive rights to their creations.

Moral rights, particularly the right to integrity, have gained importance for choreographers, as the increased digital exposure of their works has amplified their desire to preserve the original form of their creations. However, digital platforms present new challenges for protecting moral rights, given the often unequal bargaining power between choreographers and producers. The lack of substantial case law on this issue has left choreographers with insufficient guidance on protecting moral rights across various legal systems.

In the digital age, choreographers have greater opportunities to showcase their creativity and recognize the significance of copyright protection. Nonetheless, enforcement of these rights is not always straightforward, as not all uses of their works constitute infringement. Balancing the protection of creative interests with societal benefits remains a matter for each jurisdiction, guided by the Berne three-step test, which regulates the limitations of copyright for the benefit of society.

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