May I Have This Dance?: Establishing a Liability Standard for Infringement of Choreographic Works

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MAY I HAVE THIS DANCE?: ESTABLISHING A LIABILITY STANDARD FOR INFRINGEMENT OF CHOREOGRAPHIC WORKS

I. INTRODUCTION

Our country's Founding Fathers and the Framers of the United States Constitution envisioned the protection of artists and creative thinkers when they included the Copyright Clause as one of the fundamental rights of this nation's citizens. Although no one knows exactly when people first began to dance, it is known, however, that elements of dance date back to Biblical and pre-historic times, and existed in all societies, regardless of cultural or racial origin. Even today, the creative and artistic expressions of dance can be seen in one's favorite nightclub, music video, or Broadway production.

Though dancing has been a consistent aspect of our nation's history and culture, it has not received the same level of statutory protection as other forms of art. The first copyright statute was enacted in May 1790, but dance did not receive federal statutory protection until the Copyright Act of 1976 [hereinafter the Act], which added "pantomimes and choreographic works" as "original works of authorship." Although choreographic works are technically protected from piracy and exploitation, the current state of the law—in practical effect—still leaves choreographers vulnerable to theft of their creative efforts. These are the same creative efforts that the Framers and Founding Fathers envisioned would be protected by the words of our Constitution.

Consider the following hypothetical, specifically created to isolate and analyze the pertinent issues facing choreographers under the current copyright statute: Elise Payton [hereinafter Ms. Elise] owns, operates, and is the principle choreographer for the Arabesque Dance Academy [hereinafter Arabesque]. This studio offers various dance classes (e.g., tap, jazz, ballet, hip-hop, shag, modern, etc.) to students from age two to adult. There are several advanced performing ensembles within Arabesque who showcase routines throughout the state and

1 "The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ." U.S. CONST. art. 1, § 8, cl. 8.
3 Id.
5 See U.S. CONST. art. 1, § 8, cl. 8.
nation, in an effort to promote the studio and Ms. Elise's expertise. Each year, Arabesque presents a for-profit spring concert where each advanced ensemble performs several of Ms. Elise's choreographic works for the community.

One day, Ms. Elise is flipping through the television stations and catches a glimpse of a Janet Jackson music video. Janet is one of Ms. Elise's favorite performers, and Ms. Elise decides that it would be a good idea to have a Janet Jackson theme for the upcoming spring concert. In order to accomplish this goal, Ms. Elise decides to record an upcoming MTV special that will broadcast the next week. This program includes interviews with Janet's choreographer, Lisa, and shows a chronology of Janet's most popular music videos.

Over the following weeks and months, Ms. Elise studies choreographic sequences from the videos. Upon mastering these sequences, she proceeds to incorporate them into her own choreography, which she subsequently teaches to her students at Arabesque. The Arabesque dance ensemble students learn these routines, which include the choreographic sequences that Ms. Elise "borrowed" from the Janet Jackson videos, and ultimately perform them at the spring concert, where audience members pay an eight dollar admission price.

What type of liability exists for such actions of infringement? How is Lisa, the original choreographer of the pirated sequences, able to protect her creative and artistic efforts? Does Ms. Elise have a defense of "fair use" against the alleged infringement of Lisa's copyright? What are the available remedies?

The above hypothetical scenario illustrates many of the concerns of the dance community as well as many of the weaknesses of current statutory protection. The succeeding pages will explore current liability standards in various aspects of copyright law, and attempt to establish a standard of liability for the infringement of choreographic works that will be practically feasible to the dance community while at the same time retaining the fundamental elements that are the essence of copyright law.

6 Music Television (MTV), a trademark of MTV Networks, is a cable television station, targeting teenagers and youth in their twenties, that offers viewers music programming and up-to-the-minute news from the music industry. See MTV Networks, at http://www.mtv.com/sitewide/mtvinfo/faq/onair/onairA6.jhtml#q1 (last visited Mar. 12, 2003).

7 For the purposes of the following analysis, it will be assumed that Lisa has satisfied the requirements for registering her choreographic work under the Act. See discussion of requirements, infra pp. 439-440.

8 For the purposes of this analysis, we are assuming that Lisa somehow finds out about the piracy of her choreographic works by Ms. Elise.

9 The Doctrine of Fair Use is a limitation on the exclusive rights that authors have under the Act. See 17 U.S.C. § 107 (2000).

10 The following analysis will not consider the issue of compilations as it relates to this topic.
II. BACKGROUND

A. STATUTORY REFERENCES

This section will discuss the statutory terms of the Act which are most relevant to a complete understanding of the issue at hand. At the forefront of this analysis will be the terms which fundamentally establish the requirements of a copyrightable work. Many of the terms derive their power from the Constitution as well as the Act; accordingly, these sources will be highlighted.

The Act, and its most recent amendments, provides protection for "writings" of "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Therefore, the two main requirements for copyright protection are "originality" and "fixation".

The United States Supreme Court decided that "writings," as found in the Copyright Clause of the Constitution, "may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor." Therefore, under this interpretation, all of the works listed in section 102(a) of the Act are considered "writings" in the constitutional sense. Since "[i]t is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel, . . . [a]ll that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' " Although the standard of originality is minimal, some works will, nevertheless, not be copyrightable because they lack the requisite level of creativity.

The term "author" "has been construed [by the Supreme Court] to mean an 'originator,' 'he to whom anything owes its origin.' The fixation requirement means that the medium of fixation must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The broad language of the Act prevents "artificial and largely unjustifiable distinctions" that may be drawn between

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11 U.S. CONST. art. 1, § 8, cl. 8.
15 U.S. CONST. art. 1, § 8, cl. 8.
16 Goldstein, 412 U.S. at 561 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).

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different mediums of expression. A bright line is also drawn between statutory and common law copyright protection by the language of the fixation requirement.

Under the statutory requirements, Lisa would be the “author” of the choreographic work, since it originated from her creative efforts; and, by definition, the choreographic work itself constitutes a “writing” because it is a physical manifestation of the choreographer’s creative labor. The originality of the work is signified by Lisa’s “own” artistic efforts in combining and arranging “social dance steps and simple routines” (which are both excluded as individually copyrightable items) into a distinctive choreographic sequence or work. In order to comply with the fixation requirement, Lisa has resorted to videotape—one of the various forms available for capturing choreography: dance notation (also called “choreology”), videotape, motion pictures and videographics. Since the essence of choreographic works is performance, the fixation requirement is arguably unnecessary and a barrier to the creativity of choreographers.

The one element of the Act that has created confusion among the dance community is the lack of a positive definition of choreographic work. In amending the Act to include choreographic works, Congress believed the term “choreographic work[ ]” to possess a “fairly settled meaning[,]” thus leaving the dance community with a definition so vague that the scope of copyright protection is indeterminable.

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18 Joyce et al., supra note 4, at 73.
19 Id. Works that do not satisfy the fixation requirement as set forth by the statute may still be eligible for state common law or statutory protection. Federal protection, however, is only available for works that satisfy section 102.
22 Id. at 1446, n.31.
23 See id. at 1444-47. See also Barbara A. Singer, In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives v. The Custom of the Dance Community, 38 U. MIAMI L. REV. 287, 301-03 (1984) (purporting that “the fixation requirement creates a formidable obstacle to the registration of choreographic works” because the currently available methods of fixation are prohibitively costly, especially for less wealthy choreographers. There is also argument that dance notations unsatisfactorily “capture style or individual interpretation” of the choreography, while audiovisual methods “are not very useful to the choreographer or reconstructor wishing to observe isolated movements[,] . . . cannot convey the three dimensional nature of dance[,] . . . and provide[,] a mirror image of the dance, reversing left and right.”).
24 H.R. Rep. No. 94-1476 at 5667. See also Wallis, supra note 21, at 1452-55 (noting that “the current ‘negative’ definition of choreographic works does not provide adequate copyright protection”).
B. HORGAN V. MACMILLAN, INC.25

Not until 1986 did the dance community receive its first major judicial interpretation of the Act, as applied to the newly protected category of choreographic works. The issue in *Hogan* arose when the estate of renowned choreographer George Balanchine sought an injunction against the MacMillan publishing company to prevent the release of a book (*The Nutcracker: A Story & a Ballet*), which contained still photographs of Balanchine's choreographic production of *The Nutcracker*, as performed by the New York City Ballet ("NYCB").26

In December 1981, Balanchine registered his version of *The Nutcracker* ballet and deposited a videotape recording of the NYCB's dress rehearsal with the U.S. Copyright Office. Upon his death, Ms. Barbara Horgan, who had been Balanchine's personal assistant, became executrix of the estate. Horgan became aware of MacMillan's intention to publish said book, in April 1985, when she received "galleys of a text and photocopies of photographs," which "were "virtually identical" to the final version of the book, published some six months later in October 1985."27 The heart of the dispute rests upon sixty color photographs that present a sequential depiction of the NYCB's production of *The Nutcracker* ballet from beginning to end. The ultimate issue of this case was "whether still photographs of a ballet [could] infringe the copyright on the choreography for the ballet."28 District Judge Owen, of the United States District Court for the Southern District of New York, ruled that MacMillan had not infringed the choreographic copyright because "choreography has to do with the flow of the steps in a ballet. The still photographs ... catch dancers in various attitudes at specific instants of time; they do not, nor do they intend to, take or use the underlying choreography. The staged performance could not be recreated from them."29

On appeal to the Second Circuit, Chief Judge Feinberg reversed and remanded on the grounds that "the district court applied the wrong legal standard for determining whether the photographs infringe the copyrighted choreography ... ."30 Because Congress had not specified a statutory definition for choreographic works, the Court considered definitions offered by The

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25 789 F.2d 157, 229 U.S.P.Q. (BNA) 684 (2d Cir. 1986). This was a case of first impression for the Second Circuit.

26 Id.

27 Id. at 159. Apparently the photos were taken by two photographers who were considered "official photographers" of the [NYCB]" and thus authorized by Balanchine to do so. Id.

28 Id. at 160.


30 Horgan, 789 F.2d at 158.
Compendium of Copyright Office Practices, Compendium II (1984) in its analysis. Horgan argued that the book was an impermissible "copy" of Balanchine's copyrighted work because it portray[ed] the essence of the Balanchine Nutcracker, or, in the alternative, that the book [was] an infringing 'derivative work.' In this respect, Horgan implied that the district court should have used a substantial similarity test (i.e. "whether the alleged copy is substantially similar to the original"), while MacMillan countered by arguing that the photographs were not substantially similar because they were a different medium of expression that do not capture the essence of Balanchine's choreography, which is "movement".

Feinberg's opinion hinted at the possibility of photographs being an infringement of a choreographic work due to the amount of information a photograph could communicate to an observer. The ultimate issue of infringement, however, was not decided by this case, nor has it been presented to another court for adjudication. Prior to the remand proceeding, the parties in Horgan reached an out-of-court settlement. Consequently, "there is still no judicial investigation of choreographic copyright infringement and the dance community must await a future opportunity to observe and assess how the judiciary will enforce their rights."

C. THE CUSTOM OF THE DANCE COMMUNITY

The following analysis presents the practical issues relating to the copyright infringement puzzle from a perspective much different from, but equally as

31 Choreography is the composition and arrangement of dance movements and patterns, and is usually intended to be accompanied by music. Dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships. Choreographic works need not tell a story in order to be protected by copyright. Id. at 161 (quoting Compendium II of Copyright Office Practices § 450.01 (1984)).

32 Id.

33 Id. The Court appeared to agree with Horgan's proposition, stating "[t]he test . . . is whether 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." Id. at 162 (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489, 124 U.S.P.Q. (BNA) 154, 155 (2d Cir. 1960) (Hand, J.)).

34 Id. at 161-62. MacMillan also asserted that the photographs captured uncopyrightable material, which was indistinguishable from the Balanchine choreography similarly captured in the photographs. Id. at 162.

35 Horgan, 789 F.2d at 163.


37 Id.

38 Singer, supra note 23, at 287.
important as, the legal perspective. Before analyzing the applicability of the Act to the concept of choreography, it is important to understand the culture of the dance community. From understanding this culture, one will be better able to appreciate the need for a standard of liability which upholds the values of the dance community as well as adequately addresses the community's concerns and needs. For what good is a rule that has an impractical and useless effect, but for the formality of having a rule?

In Barbara N. Singer's law review article, she discusses the customs of the dance community in relation to the copyright statute. Singer points out that "the vast majority of choreographers" have not taken advantage of the opportunity to register their work under the requirements of the Act because many of them feel that the customs of the dance community more adequately address their needs than do the provisions of the Act. In presenting this analysis, Singer focuses on the means of "choreographic credit" and "choreographic control" that are predominant in the dance community and utilized in all aspects surrounding choreographic works—from creation to performance (or production).

Choreographic credit is the practice of "attaching" the choreographer's name to every performance of the work without regard to whether the choreographer, her company or some other entity has legal ownership of the work. Choreographic credit is generally accomplished by announcing the choreographer's name immediately prior to the work's performance and/or listing the choreographer in the performance handbill. In this way, the audience is sufficiently informed of the "author" of the work, thereby preventing confusion as to its creative and artistic origin.

39 Having been a member of the dance community for fifteen years as a student and instructor, I will include my own experiences as they relate to relevant cultural attitudes of the dance community as well as my understanding of particular aspects of the community.

40 Singer, supra note 23.

41 See supra notes 21-23 (discussing similar theories regarding the dance community and the inadequacy of the copyright statute in addressing its needs).

42 Singer, supra note 23, at 289.

43 Singer notes:

[E]ven those choreographers who have registered their works have been reluctant to enforce their statutory rights in a court of law. Choreographers have not eschewed the statutory mechanism for enforcing their rights because they are unaware that an enforcement mechanism exists. Instead, they have rejected this form of protection from a belief that the customs of their own community offer equal, if not superior, protection for choreographic works.

Id. at 290 (citation omitted).

44 Id. at 292-93.
The dance community customarily grants choreographic control by allowing a choreographer to “control” her works beyond the point at which they have been “released” to the public through performance or production. When owners of dance companies desire to produce a choreographer’s work, they obtain permission directly from the choreographer or her representative to do so. The parties then enter into a licensing agreement, whereby the licensee has the right to a specified number of performances of the work for a predetermined period of time. The licensee pays a licensing fee for the performance right and royalties for each performance. Under the terms of the agreement, however, the choreographer still retains “artistic control” through her ability to supervise rehearsals, participate in the staging of the work, and provide authorization for any choreographic changes to the work. The choreographer also has the ultimate right to withdraw the work from the licensee if she feels that the dance ensemble is no longer capable of performing the work with sufficient artistic integrity. Although the choreographer has the withdrawal right, this type of safeguard is limited to those within the dance community who respect the sanctions of the dance community.

Although Singer notes the rarity of breaches of custom, she points out that even in the face of such breaches, the dance community is still reluctant to seek remedies from the legal world because

choreographers view unlicensed performances as a risk of the trade . . . or free publicity[,] . . . prefer to rely on negotiation or peer pressure in settling their differences with breaching licensees[,] . . . are discouraged by the costs involved in bringing suit . . . that may strain the budget and patience of struggling choreographers[,] . . . [realize that] the small amounts of lost profit resulting from the breach . . . fail to justify legal effort[,] . . . [and fear that] legal enforcement of the contract may not offer [her] much relief[,] especially if the choreographer is not in a position of equal bargaining power. Therefore, ultimately, the dance community feels that resorting to protective methods outside of the community itself (i.e., from the legal profession) is

45 Id. at 293.

46 Prior to giving authorization, the choreographer “visits the company to determine the company’s capability of performing the dance . . . . evaluates both the technical abilities and the personalities of the company dancers . . . . [and] will permit the performance of [her] work only after being convinced that the skills of the company reflect the artistic worth of the composition.” Id. at 294.

47 Singer, supra note 23, at 296.
unnecessary and likely to be less effective since the community customs alone appear to sufficiently address choreographers’ needs. 

The dance community also believes that the current provisions of the Act illustrate, precisely, the lack of understanding that those outside the dance community have regarding the art of choreography and the dance community itself. First, the dance community utilizes a much broader definition of choreography than that which is captured in the provisions of the Act. Singer’s article contends that “[a]mong members of that community, choreography is loosely defined as anything a choreographer presents to the public” without regard to manner or form of creation. Conversely, the drafters of the Act intended to construct a provision with certain standards of originality. The Act itself does not even contain a specific meaning for “choreographic work” in Section 101 (“Definitions”). Intentionally leaving the definition of “choreographic works” undefined—because they felt that the category had a “fairly settled meaning”—the drafters’ only statement regarding the definition of this category of work was that it was not “necessary to specify that ‘choreographic works’ do not include social dance steps and simple routines.”

In the eyes of the dance community, such a characterization of choreography effectuates the creation of a minimum level of difficulty that must be met before a work can be protected. This threshold requirement may ultimately result in the uncopyrightability of works that are highly innovative and/or very simplistic because they are grounded in such basic or common components. Additionally, the dance community worries that the requirement that copyrightable works promote the useful arts will be used by the legal system to “judge the moral worth of choreographic works” and believes that this bias, which is constitutionally based, will be harder to overcome in the effort to gain sufficient protection for choreographic works. It appears, therefore, that the dance community disagrees with the well-established meaning that the drafters of the Act believed the term “choreographic works” to have.

Secondly, choreographers are concerned with the “originality” requirement of the Act. Since the courts, as of yet, have not determined the level of originality necessary for choreographic works, the dance community worries about how this

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48 Id. at 297.
50 Singer, supra note 23, at 297-98. This type of characterization of choreography would mean that choreographic works composed solely of social dance steps or elemental techniques may not reach the level of difficulty necessary for protection.
51 Id. at 299. Apparently, as Singer notes, choreographers’ refusal to register their works under the Act is also their refusal to offer “tacit approval [of] the statutory and case law definitions of choreography that they . . . find so offensive.” Id.
52 Id. at 300.
eventual determination will affect the protection that is ultimately provided to choreographic works. Because a choreographic work potentially consists of individual dance steps, which themselves are not copyrightable, a judicial determination of the level of originality needed for copyright protection could render many choreographers’ works uncopyrightable. This result could be devastating to the dance community. The dance community, however, believes that a choreographer’s work should be copyrightable “as long as the dance bears the choreographer’s individual stamp [i.e. “the choreographer’s treatment of rhythm, space and movement in the work”53] . . . [regardless of whether her] dance uses well-known or often-used steps.”54 These competing notions present a problem that will need to be resolved before there can be adequate protection of choreographic works. The dance community, however, fears that the court’s lack of knowledge regarding choreography will hinder its ability to make the artistic and creative decisions necessary to accomplish such a task.

Finally, choreographers view the fixation requirement as a technical burden that is unnecessary for copyrightability.55 My personal experience in the dance community demonstrated exactly how temporal the creation of a choreographic work can be. Often, choreographers begin the creation of a choreographic work with only a few steps or techniques in mind. Much of the creative process is trial and error, as the choreographer listens to the music, throws out ideas, and suggests various movements to the dancers to see if they “go” with the music and with the choreographer’s overall artistic concept for the choreographic work.56 It is this artistic concept, the “totality” of the choreographic work, that the dance community believes should be captured with fixation.57 The Act’s provisions themselves, however, only require that enough of the choreographic work be fixed so that it may “be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”58 Similarly, there must be enough of the work presented to later prove infringement, if necessary. Though several forms of fixation are currently available to the dance community, most often, the most effective method will depend upon the purpose for which the choreogra-

53 Id.
54 Singer, supra note 23, at 300.
55 This principle is given an in-depth discussion in Anne K. Weinhardt, Copyright Infringement of Choreography: The Legal Aspects of Fixation, 13 J. CORP. L. 839 (1988).
56 Also embedded in this process is a consideration of the dancers’ technical skill levels, which often play a large part in determining which movements to incorporate into the choreographic work.
57 For the dance community, the “totality extends beyond the mere movements through space and time to include the feelings, emotions, and sensations which are conveyed by the choreographic piece when all the parts come together to form the dance.” Weinhardt, supra note 55, at 855.
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Phifer is copyrighting her work.69 Additionally, the choreographer will have to consider the effectiveness, cost, convenience, and ease of use (and/or understanding) in court of the fixation method chosen. The lack of litigation on this issue has also left an unanswered question regarding a more specific definition of publication, which will also weigh greatly on the method of fixation required.60 In essence, the fixation requirement leaves many uncertainties (both legally and practically) that will need to be clarified before choreographic works can be protected effectively.

Although the dance community strongly believes that its customs will adequately protect its interests, what happens when those who are traditionally outside the sanctions of the dance community “pirate” a choreographer’s work? It is true that the judicial system has not currently had the opportunity to establish either limitations for or the scope of relevant provisions of the Act. However, the future success of the dance community may become so threatened by piracy from outside the traditional realm that the need and desire for judicial interpretation of statutory provisions will become inevitably necessary.

III. Statutory Provisions

A. The Exclusive Rights of a Copyright Holder Relating to Infringe-ment

The uniqueness of choreographic works as a category of copyrightable works provides a challenge for establishing an adequate standard of liability. The use of independently uncopyrightable steps, which may be incorporated into a larger work that is itself copyrightable, creates a complex situation for determining that sufficient originality exists to satisfy the statutory requirements. Conversely, the overwhelming importance of the performance right to the survival (and potential piracy) of a choreographic work seemingly outweighs other statutory considerations.

59 See Weinhardt, supra note 55, at 855-56 (observing that the Register of Copyright differentiates between the requirements for published and unpublished works). Only a “complete copy” of the work sought to be protected is required for unpublished works while a “best edition” is required for published works. These varied standards will ultimately influence the means of fixation; because if a means of fixation is used that ineffectively captures the elements needed for copyright protection, the choreographer’s work will be left vulnerable to piracy. Id.

60 Because the work’s status as “published” versus “unpublished” ultimately determines the type of copy (a “complete copy” or a “best edition”) that needs to be registered with the Copyright Office, a specific definition of what constitutes publication for a choreographic work will be necessary in making this determination. Currently, no such determination exists.
The Act provides the following exclusive rights to the owner of the copyright:

1. to reproduce the copyrighted work in copies . . . ;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies . . . of the copyrighted work to the public . . . ;
4. in the case of . . . choreographic works, . . . to perform the copyrighted work publicly;
5. in the case of . . . choreographic works, . . . to display the copyrighted work publicly . . . .

Arguably, the dance community holds the rights of display, performance, and preparation of derivative works to be the most economically valuable of the exclusive rights protected under the Act. It is these rights that truly capture the purpose of a choreographic work—to be exhibited on a stage for the enjoyment of an audience. Therefore, the very essence of the Act, which is to protect unauthorized copying of an author’s work, seemingly provides little benefit to choreographers and the dance community.

In order to infringe upon a holder’s copyright, there must be proof of ownership of a valid copyright by the plaintiff and proof of substantial copying by the defendant (i.e., the alleged infringer), which results in a violation of one of the copyright holder’s exclusive rights. Because copyright infringement is a strict liability act, no intent or actual negligence is required on the part of the alleged infringer. The mere act of copying, which later turns out to be unlawful, of a protected work is sufficient to hold the alleged infringer liable for violating.

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61 The owner of the copyright is typically called the copyright holder, who can potentially be different from the author or creator of the protected work. Likewise, the copyright holder’s rights may be “unbundled” and individually transferred or assigned to others. But for simplicity of the discussion here, the copyright owner and choreographer will be one and the same person. The assignment or transfer of rights will not be considered herein.

62 17 U.S.C. § 106 (2000). The exclusive right “(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission” will not be discussed herein and therefore has been excluded from the list above. Id.

63 Singer, supra note 23, at 304-05.

64 Note that “[i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright . . . [but] [t]he evidentiary weight to be accorded . . . shall be within the discretion of the court.” 17 U.S.C. § 410(c).

65 “Anyone who violates any of the exclusive rights of the copyright owner . . . or of the author . . . is an infringer of the copyright or right of the author, as the case may be.” 17 U.S.C. § 501(a) (2000).
the copyright holder's exclusive rights. Thereafter, the copyright holder has several remedial options available, ranging from injunctive relief to actual litigious proceedings (both criminal and civil) against the infringer.66

The process does not end with a determination of infringement because the alleged infringer may then assert some counter-argument or defense. The Doctrine of Fair Use provides the most common67 limitation on the exclusive rights of the copyright holder.68 Arguably a defense to copyright infringement, fair use provides some degree of legal justification for the taking of another's creative efforts.69 Because of its complex nature, fair use is determined on a case-by-case basis, with specific attention paid to the facts as they relate to the four statutory factors.70

The following will begin the analysis of various other liability standards that may prove helpful in establishing the same for choreographic works. Cases will be presented to introduce the fundamental tests or standards for applying the relevant provisions of the Act (i.e., those relating to the exclusive rights to prepare derivative works, to display the copyrighted work publicly, and to perform the work publicly). These concepts will then be applied to choreographic works, particularly with regard to the hypothetical presented earlier. In analyzing the categories of copyrightable works, there appears to be a significant amount of similarity between choreographic works and musical compositions. As the analysis progresses, these parallelisms will be highlighted for consideration. In comparing choreographic works to musical compositions, particular care will be given to the Copyright Office's practices in handling these two items.71 The

67 See Gennerich, supra note 36, at 401, n.92.
68 17 U.S.C. § 107 (2000). “[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright.” Id. The following factors are listed to aid, but are not dispositive or exhaustive, in the determination of fair use:
1. the purpose and character of the use ...;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

69 The drafters of the Act describe it as “an equitable rule of reason” that has been previously given much judicial consideration, and that this statutory provision is “intended to restate the present judicial doctrine ... not to change, narrow, or enlarge it in any way.” H.R. REP. NO. 94-1476, at 65-66 (1976).
70 Id.
71 See generally Library of Congress. Copyright Office, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES (1984) (depicting the Copyright Office's guidelines for examining copyright claims under
attention given to the discussion of musical compositions will then be utilized (by analogy) to facilitate the establishment of a liability standard for choreographic works.

B. THE ADAPTATION RIGHT

Section 106(2) of the Act allows the copyright holder to prepare derivative works based upon the copyrighted work. By allowing for adaptations, the Act expands the definition of "copying" to include much broader concepts than would traditionally be considered. Without the adaptation right, however, the Act would only provide copyright holders with protection for verbatim copying that was in the same medium of expression as the original copyrighted work. The author of the derivative work does not merely "copy" (as used in the traditional sense) the preexisting work but, rather, adds her own creative expression to create an entirely new work worthy of its own individual copyright protection. Therefore, the Act essentially protects "the material contributed by the author of [the derivative] work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material" because the copyright in the derivative work "is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." But unlike the underlying work, some derivative works need not be fixed in tangible mediums to be an infringement of the underlying work. The lack of a fixation requirement for some derivative works, such as derivative choreographic works, increases the category of works that could potentially infringe upon a copyrighted work, in a manner that makes copyright holders more vulnerable to piracy.

the 1976 Copyright Act). This source is not a "rule book" but rather a starting point from which the staff of the Copyright Office begins its analysis of copyright claims.

This right is termed the adaptation right because the Act permits the copyright owner to adapt or to transform the preexisting copyrighted work into other forms of expression. Further discussion on this topic follows.

A derivative work is defined as "a work based upon one or more preexisting works . . . or any [ ] form in which a work may be recast, transformed, or adapted" including "editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship . . . ." 17 U.S.C. § 101 (2000).

See JOYCE ET AL., supra note 4, at 518.


The drafters of the Act specifically noted that "the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in a tangible form." H.R. REP. NO. 94-1476 at 62.
In order to infringe upon the adaptation right, "the infringing work must incorporate a portion of the copyrighted work in some form." The courts have established various standards by which to determine if an alleged infringer has violated the copyright holder's adaptation right.

*Williams v. Broadus* illustrates that once the court determines that the preexisting work has been copied, particular attention is then given to whether or not the alleged infringer's work is substantially similar to the copyrighted work, thereby amounting to an "unlawful appropriation" by the alleged infringer. An infringing derivative work does not exist, however, if "a secondary work transforms the expression of the original work such that the two works cease to be substantially similar."

Therein, defendant Broadus (more popularly known as rapper Snoop Dogg), is accused of infringing plaintiff Williams' adaptation right to the song "The Symphony." Broadus created a song entitled "Ghetto Symphony," which included lyrics and music from plaintiff's song, without plaintiff's permission. Before the court could decide whether Broadus had infringed Williams' adaptation right, there had to be a determination of whether Williams had infringed the adaptation right to Ottis Redding's "Hard to Handle." Williams copied (or sampled) the opening two measures, which consisted of ten notes—one five note ascension phrase and one five note descension phrase—from a total of 54 measures in "Hard to Handle." The court ultimately determined that Williams' song was not a derivative work of the Redding composition, but rather a "fragmented literal similarity" because even though "parts of the pre-existing work [were] copied . . . note for note in the new

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77 *Id.*
79 This concept of substantial similarity, which is vague and usually fact intensive, will be seen throughout the following analysis as the relevant standard for determining copyright infringement liability.
80 *Williams*, 2001 WL 984714, at *3. Note that the ultimate issue of Broadus' infringement liability is not decided in this case.
81 *Id* (citing 1 Nimmer § 3.01 at 3-3).
82 *Id* at *1.
83 Broadus sought to invalidate Williams' copyright for "The Symphony" under section 103(a) of the Copyright Act, which forbids protection of parts of a derivative work that unlawfully use parts of the preexisting work. *Id*
84 The concept of "sampling" will also be used to describe the act of copying preexisting musical compositions or recordings into new songs. Sampling is accomplished by digitally extracting parts of a preexisting work from its master recording and entering it into a digital sampler, or by hiring musicians to re-perform portions of the preexisting musical composition. *Id* at *1 n.1.
work," the sampled notes, in considering the totality of the musical compositions, did not amount to a substantial portion (neither quantitatively nor qualitatively) of "Hard to Handle".  

The following tests, offered and explained in Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., are used to determine the unlawful appropriation of protected works:

"Substantial Similarity" test: "requires . . . copying [be] quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred . . . [with] [t]he qualitative component concern[ing] the copying of expression, rather than ideas . . . [and] [t]he quantitative component generally concern[ing] the amount of the copyrighted work that is copied." 88

"Ordinary Observer" test: provides that "[t]he qualitative component concern[ing] the copying of expression, rather than ideas . . . [and] [t]he quantitative component generally concern[ing] the amount of the copyrighted work that is copied." 88

"Total Concept and Feel" test: analyzes "the similarities in such aspects as the total concept and feel, theme, characters, plot, sequence, pace, and setting' of the original and the allegedly infringing works." 89

"Fragmented Literal Similarity" test: "focuses upon copying of direct quotations or close paraphrasing." 90

"Comprehensive Nonliteral Similarity" test: "examines whether 'the fundamental essence or structure of one work is duplicated in another.'" 91

The court in Williams utilized the fragmented literal similarity test in ruling that Williams had not created an infringing derivative work. The court noted that
fragmented literal similarity was most appropriate for cases in which the preexisting work and the allegedly infringing work were captured in the same medium of expression. The court in Williams rejected the use of the ordinary observer (therein, listener) test, seeming to focus on the small quantity of sampling by Williams of “Hard to Handle” that would not give the two works the same aesthetic appeal, as required by that test.

In addition to ascertaining the status of an allegedly infringing work as a derivative work, one must consider whether a license to create a derivative work was obtained by the alleged infringer. If the alleged infringer has a license from the copyright owner to create a derivative work, then that derivative work is not an infringement.

C. THE PUBLIC DISPLAY RIGHT

Under the provisions of the Act, copyright holders gained the right to display their copyrighted works publicly. The addition of the public display right to the Act represented the “first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or image of it, to the public.” Notice also that the concept of display includes directly showing the original work as well as the projection of images of the copyrighted work, whether it is on a screen or transmitted to some other electronic storage and retrieval device. The language of the Act and its legislative history indicate the application of this right to all categories of copyrightable works, except sound recordings. Moreover, the Act limits protection to only “public” displays of copyrighted material.

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93 Williams, 2001 WL 984714, at *3 n.6.
94 “It appears to be well established that if one intends to create and commercially exploit a work that is derivative of a copyrighted work, a license to do so must be obtained from the owner” that basically gives “permission to use a part or all of the original work, which otherwise the copyright laws would prohibit.” Russell v. Price, 448 F. Supp. 303, 198 U.S.P.Q. (BNA) 523 (C.D. Cal. 1977).
95 The Act specifies that “[t]o ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process . . . .” 17 U.S.C. § 101 (2000).
98 Id. at 64.
99 Id. at 63. See also Joyce et al., supra note 4, at 593 (noting that the public display right is not applicable to sound recordings).
100 To perform or display a work “publicly” means—to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate
Therefore, even if the display is unlawful or unauthorized, there can be no actionable claim of infringement unless this display was also done "publicly".

Certain limitations also appear within the Act that define the scope of this right, particularly in the face of emerging technologies, and of the copyright holder's ability to control the display of copyrighted works. The First Sale Doctrine,\textsuperscript{101} authorizes the lawful purchaser of a "copy" of a copyrighted work to publicly display that "copy", without the copyright holder's permission. Section 110 exempts certain types of public display (and public performances for that matter) from possible classification as copyright infringement. The terms of section 111 further discuss the implications of infringement liability for the television, cable and/or optical transmissions of copyrighted works. The intent of these limitations "is to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected."\textsuperscript{102}

The legislative history of the display right significantly clarifies many of the nuances of this right. The drafters of this section wanted to ensure that the Act emphasizes that the display right applies to "original works of art as well as to reproductions of them," which follows from the understanding that "‘copies’ are defined as including the material object ‘in which the work is first fixed.’"\textsuperscript{103} The term 'publicly', as defined in section 101, includes places open to the public as well as any place where a "substantial" number of people outside of a family's normal acquaintances and social circle are assembled. Congress, in drafting the display right, attempted to demystify this provision by defining a family as "an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private."\textsuperscript{104} This categorization as "private", however, is not extended to what Congress considers "semipublic" places, like "clubs, lodges, factories, summer camps, and schools."\textsuperscript{105} In essence, Congress distinguishes such "semipublic" places as squarely falling into the category of public locations where any display of a copyrighted work is subject to a claim of infringement.\textsuperscript{106}

\textsuperscript{102} H.R. REP. NO. 94-1476, at 80 (1976). See also JOYCE ET AL., supra note 4, at 596.
\textsuperscript{103} H.R. REP. NO. 94-1476, 64 (1976).
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
Judicial decisions have further facilitated an understanding of the provisions of the display right, particularly by adopting many of the drafters' intentions into judicial law. Under the guise of section 106(5), the courts have expressly determined that the Act applies the display right "broadly enough to encompass indirect transmission to the ultimate public" through "each and every method by which [] images or sounds comprising a performance or display are picked up and conveyed." Moreover, the court in PrimeTime specifically noted that requirement of public display pertains to "each step in the process by which a protected work wends its way to its audience" since "the definition of transmit 'is broad enough to include all conceivable forms and combinations of wired or wireless communications media.'"

Therein, the defendant satellite carrier, PrimeTime, allegedly infringed the copyright of plaintiff National Football League (commonly referred to as the "NFL") by transmitting secondary broadcasts of NFL games to PrimeTime's Canadian carriers. The NFL simultaneously broadcasts and video records all of its football games to later be registered for copyright protection. Although PrimeTime had a "statutorily granted license to make satellite transmissions to its subscribers in United States households that do not have adequate over-the-air broadcast reception from primary television stations," PrimeTime was not authorized to provide such service to its Canadian subscribers. Upon discovering PrimeTime's actions, the NFL demanded such action to cease. PrimeTime persisted, however, in justifying its actions by saying that the public display was the downlink from the satellite to the Canadian homes, which constitutes action in a foreign jurisdiction and beyond the Act's control. The court rejected this argument, on the grounds that the display right applies to every step of a transmission that ultimately reaches the public. Therefore, the primary uplink (from the simultaneous broadcast to the satellite), just like the downlink is subject to potential infringement liability. The court's decision in PrimeTime truly illustrates the breadth of the display right, particularly its relation to various known and unknown communications media.

110 Id.
111 Id. at 11.
D. THE PUBLIC PERFORMANCE\textsuperscript{112} RIGHT

Previously found in the Copyright Act of 1909, the public performance right only applied to “for profit” performances, which the Supreme Court, in \textit{Herbert v. Shanley Co.},\textsuperscript{113} defined as any performance that “took place in a commercial setting.”\textsuperscript{114} This interpretation led to confusing distinctions between what did and did not constitute a commercial setting. Performances by schools and churches as well as other nonprofit organizations, however, were generally not considered to be for profit and were thus exempted from statutory control.\textsuperscript{115}

Today, the provisions of the public performance right\textsuperscript{116} do not include this for profit requirement and therefore apply to all performances, regardless of whether for profit or not, and all categories of copyrightable works, including sound recordings. Congress, in drafting this Act, intended to “first . . . state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.”\textsuperscript{117} This approach, although different from that taken by the Copyright Act of 1909, appeared more reasonable, given the line drawing problem between commercial and nonprofit organizations.

The courts have also adopted and recognized the abrogation of the for profit requirement in the public performance right.\textsuperscript{118} In \textit{LaSalle Music Publishers},\textsuperscript{119} the court accepted plaintiff LaSalle Music’s argument that the Act did not require plaintiffs seeking copyright protection to plead or prove that the alleged infringer’s performance of the copyrighted work was for profit. The court analyzed the legislative history of the Act to come to its determination that Congress intentionally changed the for profit language from “the section granting the bundle of rights” to “a ‘not for profit’ exemption . . . now included in 17 U.S.C. § 110(4).”\textsuperscript{120} Ultimately, the court noted that any relevant exemptions to the exclusive bundle of rights promulgated in section 106 “should be raised by the defendant as an affirmative defense.”\textsuperscript{121}

\textsuperscript{112} “To ‘perform’ a work means to recite, render, play, dance or act it, either directly or by means of any device or process . . .” 17 U.S.C. § 101 (2000). The Act goes on to emphasize that a “device” or “process” relates to anything “now known or later developed.” \textit{Id.}

\textsuperscript{113} 242 U.S. 591 (1917).

\textsuperscript{114} JOYCE ET AL., supra note 4, at 554.

\textsuperscript{115} \textit{Id.}


\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.} at 169.

\textsuperscript{121} \textit{Id.}
Like the public display right, the public performance right contains many of the same provisions previously discussed. The scope of the public performance right is specifically limited to those performances that are "public," irrespective of whether the performance is of the original rendition or any other method by which the performance may be transmitted to the public. Similarly, the limitations of sections 110 and 111 also apply to the public performance right. Separate and distinct from the previously mentioned limitations, the public performance right is subject to other limitations in the Act.

E. THE FAIR USE DOCTRINE

"Given express statutory recognition for the first time in section 107 of the 1976 Act, the fair use doctrine actually originated as a common law doctrine that became judicially recognized in Folsom v. Marsh, an 1841 United States Circuit Court decision. Therein, Justice Story, giving the opinion for the court, set out factors for determining whether an alleged infringer's work was really a justifiable use of a preexisting copyrighted work or an infringement. Over time, these elements of Story's opinion were transformed into the four factors contained in the Act's current fair use provision.

Several important judicial decisions have broadened the understanding of the fair use doctrine, as well as aided in clarifying the scope of the factors used in making such a determination. Two of the most influential decisions were found in the United States Supreme Court opinions of Harper & Row Publishers, Inc. v. Nation Enterprises and Campbell v. Acuff-Rose Music, Inc. In discussing the
factors of fair use, both opinions present similar reasoning, which has become almost standardized in any fair use analysis.

The courts generally agree that considerations of fair use should be made with an eye toward fulfilling copyright's constitutional purpose of promoting the progress of science and the useful arts. As a mixed question of fact and law, the doctrine of fair use often requires the court to participate in a difficult and factually based line drawing process. Because of this process, the doctrine of fair use differs from other legal "rules," in that there are no rigid guidelines by which to ascertain the applicability of the doctrine. The flexibility of the doctrine, in its operation with all the categories of copyrightable works, can be seen in the four statutory factors used to establish fair use. These factors are not considered in isolation, but are balanced against each other to arrive at an ultimate conclusion as to the applicability of the fair use doctrine.

1. Purpose and Character of the Use. This factor focuses on the "transformative" character of the new work (i.e. the amount of creative originality the alleged infringer added to the work in comparison to the amount of the work taken from the previously existing work). The Supreme Court has rejected the argument that a commercial use or purpose alone creates a presumption against fair use. The commercialism of the allegedly infringing work must still be balanced against the other factors. Harper & Row also points out that because "[f]air use presupposes 'good faith' and 'fair dealing'" the character of the alleged infringer's conduct should be analyzed. The Court also emphasizes that the characterization of a work as nonprofit or educational is not automatic insulation from infringement liability.

2. The Nature of the Copyrighted Work. Here, greater emphasis is given to the fair use of fictitious versus factual works because fictitious works are perceived as being "closer to the core of intended copyright protections." Also, the status of a preexisting work as unpublished narrows the applicable scope of fair use

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133 Id. at 575. See also Harper & Row, 471 U.S. at 549.
136 "[W]hether the new work merely 'supersedes' the objects of the original creation . . . or instead adds something new, with a further purpose of different character, altering the first with new expression, meaning, or message." Campbell, 510 U.S. at 579.
137 Harper & Row, 471 U.S. at 562 (quoting Time Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 146 (S.D.N.Y. 1968)). The weight against fair use given to the alleged infringer who attempts to exploit the preexisting work should be greater than against one who acts with permission, under a noncompetitive spirit or for educational purposes.
138 Campbell, 510 U.S. at 584.
140 Campbell, 510 U.S. at 586. See also Harper & Row, 471 U.S. at 563.
since "the author's right to control the first public appearance of [her] expression weighs against such use of the work before its release." \textsuperscript{141}

3. \textit{The Amount and Substantiality of the Portion Used.} \textsuperscript{142} Analyzed in relation to the whole of the preexisting copyrighted work, consideration is given to whether the allegedly infringing work takes "the heart of the original and make[s] it the heart of [the] new work." \textsuperscript{143} This consideration reveals the qualitative aspect and a more likely presumption against fair use, especially if the copying was verbatim. Similarly, the quantitative aspect relates to the number of musical phrases, verbatim words, visual images, etc. that are taken from the original work. Ultimately, however, the quantity and quality of "permissible copying varies with the purpose and character of the use" as well as with the extent to which the allegedly infringing work may affect the potential market for and value of the original work. \textsuperscript{144}

4. \textit{The Effect on the Market.} \textsuperscript{145} In analyzing this factor, the courts consider the actual market harm to the original work as well as the alleged infringer's adverse impact on the original creator's potential market for the original and/or a derivative work. \textsuperscript{146} Fair use cannot exist if the alleged infringer's work "adversely affects the value of any of the rights in the copyrighted work." \textsuperscript{147} The amount of market harm will vary according to the facts relating to the other factors; \textsuperscript{148} and similarly, the market for any derivative works will depend upon "only those that creators of [the] original works would in general develop or license others to develop." \textsuperscript{149}

Because the doctrine of fair use is an affirmative defense, the alleged infringer has the burden of proof once the copyright holder has established unlawful copying of the protected work.

\section*{IV. ANALYSIS}

The previous material has provided the foundation for applicable copyright law, which will be utilized in this section. As this Note has demonstrated, neither the customs of the dance community nor the current status of judicial decisions provides a sufficient scope of copyright protection for choreographic works.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Harper \\& Row}, 471 U.S. at 564. \textsuperscript{141}
\item 17 U.S.C. § 107(3) (2000). \textsuperscript{142}
\item \textit{Campbell}, 510 U.S. at 587. \textsuperscript{143}
\item \textit{Id.} at 586-87. \textsuperscript{144}
\item 17 U.S.C. § 107(4) (2000). \textsuperscript{145}
\item \textit{Campbell}, 510 U.S. at 590. \textsuperscript{146}
\item \textit{Harper \\& Row}, 471 U.S. at 568. \textsuperscript{147}
\item \textit{Campbell}, 510 U.S. at 591 n.21. \textsuperscript{148}
\item \textit{Id.} at 592. \textsuperscript{149}
\end{enumerate}
\end{footnotesize}
While the dance community’s practices and sanctions are limited to those within the dance community, the range and effect of judicial decisions is hindered by the lack of case law on point and the dance community’s reluctance to rely on the legal profession to provide adequate assistance with this issue.

Consider the following application of the previously discussed material as it relates to the hypothetical above. As was assumed, Lisa is the choreographer and “author” of the choreographic sequences that Ms. Elise borrowed from Janet Jackson’s videos and ultimately incorporated into her own choreographic pieces. Ms. Elise later taught her dance students these choreographic sequences, which were subsequently performed in a for profit dance concert for the community.

As the creative mind behind Janet Jackson’s choreography, Lisa is entitled to the exclusive bundle of rights provided by the Copyright Act of 1976. The first issue that presents itself is that of Lisa learning about Ms. Elise’s activities. For the purpose of this analysis and for simplicity’s sake, just assume that one of Lisa’s friends, who happens to live in the community in which Arabesque presented its spring concert, saw the show and then informed Lisa of this possible infringement.  

At this point, Lisa brings suit against Ms. Elise because Lisa feels that her rights as an artist have been violated. What preliminary facts must first be resolved? Lisa has proof that her work has been registered with the U.S. Copyright Office, thereby satisfying the requirements that her work be original and fixed in a tangible medium. Before Lisa can successfully bring suit for liability against Ms. Elise, Lisa must first demonstrate that she owns a valid copyright and that Ms. Elise has unlawfully appropriated Lisa’s copyrighted work. Lisa’s registration with the copyright office is prima facie evidence of her valid copyright. Determining unlawful appropriation, however, will create problems, especially in determining whether Ms. Elise’s work is an infringing derivative work in violation of Lisa’s adaptation right, as well as whether the public display and/or performance rights have been violated in Arabesque’s presentation of its spring concert.

A. ADAPTATION RIGHT

The facts establish that Ms. Elise borrowed sequences from Lisa’s work without permission by video recording the sequences from an MTV broadcast.  

150 In reality, the fact that the type of action Ms. Elise has engaged in has occurred outside the realm of the professional dance community restrains many choreographers like Lisa from discovering the potential infringement so that the proper legal action could be taken. To resolve this problem, there should be performing rights societies comparable to ASCAP or BMI, which ensure that the proper licenses are obtained for the use of copyrighted material.
The issue is whether the borrowed sequences were enough to render the two works substantially similar, thereby indicating an unlawful appropriation by Ms. Elise of Lisa's protected work.

Under the substantial similarity test, there should be consideration of the quantity and quality of the choreographic sequences appropriated from Lisa. Like with musical compositions,\textsuperscript{151} this analysis should go to the physical number of sequences taken, but more importantly, to whether the appropriated sequences capture the expressive core of Lisa's choreography. The expressive core of a choreographic work would be the sequences that an ordinary audience member would immediately recognize as the work of a particular choreographer.\textsuperscript{152} Likewise, the ordinary observer test would be beneficial in such a determination. After all, it is fear that observers will mistake one author's work for another that this test seeks to alleviate. If an observer would easily identify Ms. Elise's work as being composed mostly of Lisa's work, there should be a greater presumption that Ms. Elise's work is an infringing derivative work. Because choreographic works are visual in nature, the remaining tests of unlawful appropriation would not be suitable.

In this and similar situations, there will most likely not be a license to create a derivative work. If one is operating within the confines of the dance community, however, the existence of a license to create a derivative choreographic work may be worth considering.

B. THE PUBLIC DISPLAY RIGHT

The application of the public display right does not fit nicely into the hypothetical being discussed. But theoretically, there could be a violation of this right in certain situations. This concept goes back to the issue in \textit{Horgan v. MacMillan}.\textsuperscript{153} To the extent that a photograph could capture the image of a copyrighted choreographic work, the display right would be violated once that image was transmitted publicly. Therefore, Judge Feinberg's instinct that

\textsuperscript{151} The analogy to musical compositions makes sense because musical compositions are also comprised of smaller, uncopyrightable elements that can be combined to create a protected work. Similarly, the concerns of fixation still exist, especially for those who prefer to compose by ear and perform from memory, but are not as serious with musical compositions because fixation in sheet music is a common practice in the music community.

\textsuperscript{152} This concept works in much the same way as the distinctive sounds that some musical compositions possess, which lend themselves to being recognized from the playing of just a few notes, chords, or drum beats. Because the theme of the concert centers around Janet Jackson, there is greater argument that the expressive core of Lisa's choreography is captured in Ms. Elise's work. This argument may be countered, however, by saying Ms. Elise's work lacks a transformative nature.

\textsuperscript{153} 789 F.2d 157 (2d Cir. 1986).
photographs could be an infringement of the copyrighted work of the NYCB was correct, though his rationale was not. MacMillan's book would not be a derivative work, but more likely, would violate the public display right, since it was the images of the performances that were being captured and transmitted.

C. THE PUBLIC PERFORMANCE RIGHT

Because Ms. Elise is presenting a dance, consisting of protected choreographic material directly to the community, the public performance right needs to be analyzed. Since the public performance right applies to every phase in a transmission process, there is potential liability at the point that Ms. Elise teaches the borrowed sequences to her dance students. Lisa's work is still being performed. But in this case, the requirement of public performance may have been satisfied, since schools are generally considered semi-public and thus not private. Ms. Elise's actions in the dance classroom may be insulated by section 110 of the Act, which exempts face-to-face teaching in the classroom or any similar instructional setting.

The next phase in transmission would be the spring concert. The fact that the Arabesque spring concert is for profit has no bearing on whether this right has been infringed. The fact that Ms. Elise's work is being presented before an entire community satisfies the requirement that the work be performed publicly.

D. THE FAIR USE DOCTRINE

Once Lisa has established a prima facie case of infringement, Ms. Elise may assert fair use as a defense. The court would balance the four statutory factors presented in section 107 of the Act. In analyzing the purpose and character of Ms. Elise's use, the fact that the spring concert was for profit would be weighed against the fact that Lisa's work was used, at least partially, in an instructional setting. As for the transformative quality, Ms. Elise does add her own creativity to the appropriated dance sequences. The question then becomes whether Ms. Elise's creative incorporations were enough to outweigh the sequences taken from Lisa's protected work. There is an argument, however, that Ms. Elise acted with good faith and fair dealing in that she was not attempting intentionally to compete with Lisa or to claim Lisa's work as her own.

Because Lisa's copyrighted work is not factual in nature, it more closely represents the essence of the purpose of copyright protection, therefore making

154 There is not enough information in the hypothetical to fully explore this concept. However, since the theme of the Arabesque spring concert was focused on Janet Jackson, there can be an inference that Ms. Elise's work may not be transformative enough.
MAY I HAVE THIS DANCE?

a finding of fair use more probable. Ms. Elise could arguably be presenting a choreographic comment, which highlights and honors the popularity of Lisa’s choreographic creativity. Following this notion, the nature of Ms. Elise’s work would more than likely fall within the limits of permissible copying that are illustrated by the text of section 107.

Here again, the quantity and quality of the choreographic sequences appropriated from Lisa are considered. If it is found that Ms. Elise borrowed the most recognized and popular choreographic sequences, that weighs against the applicability of the fair use doctrine because Ms. Elise will have taken the heart of Lisa’s work and made it her own. This action would be similar to verbatim copying of a substantial amount of a protected literary work. Emphasis should be placed on the qualitative aspect, which usually proves to be more related to the expressive nature of a work.

The effect on the market may not be a substantial factor considering that choreography is not usually purchased. The value of choreography does not extend far beyond the boundary of the dance community itself. Even to the extent that a choreographer’s work achieves national or international acclaim, the value of that choreographic work as an original creation by a particular choreographer can withstand the influence of derivative works created by less popular choreographers.155

V. CONCLUSION

Once the issue of the infringement liability for choreographic works finally reaches the courts again, the creation of a standard of liability should not be difficult. It is simply a matter of aligning choreographic works with current legal doctrines regarding infringement liability. A thorough and practical judicial decision by the courts may be just what the dance community needs as a final step toward appreciating the legal profession’s approach to the copyright of choreographic works.

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155 Notice the longevity and continued popularity of Balanchine’s Nutcracker, which has been adapted by other choreographers and performed by other dance companies. However, the success of the NYCB continues even in the face of such competition. The same can be said for the choreographic works of Alvin Ailey, which continue their popularity and success in the face of adaptations by other dance companies.