



LEGAL ISSUES



Section Editors: Bruce Strauch (Retired, The Citadel) <bruce.strauch@gmail.com>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Legally Speaking – Dance and Copyright

Column Editor: **Anthony Paganelli** (Western Kentucky University) <Anthony.Paganelli@wku.edu>

As the saying goes, “dance like no one is watching.” In the realm of copyright and choreography, it might be best if no one is watching if you are using a copyrighted dance work. Of course, understanding the copyright and choreographed relationship has been difficult since it was added to the U.S. Copyright Law Section 102(a)(4) in 1976. Due to this recent addition to copyright law, there is little legal literature regarding the representation of dance infringement litigation. There are some high profile infringement issues that involve Martha Graham, as well as Beyoncé.

The major issues in choreographed works and copyrights is determining how and what is a copyright choreographed work. For instance, Michael Jackson performed the iconic “moonwalk” dance move during a live event in 1983. The move has been reproduced by numerous people and performed in different public events. Even though we associate this dance move with Michael Jackson, it was performed several decades before and was never copyrighted.

As noted by Saucier (2018), “The Moonwalk is not a work protectable by Copyright Law because it is considered a ‘social dance step’ or ‘simple routine,’ which is explicitly not covered under copyright law.” In fact, the dance move was first documented by Cab Calloway around 1930, and later with Bill Baily during performances at the Apollo Theater in 1955. The dance move was not a unique style of dance and has been performed over the past several decades before it was globally popularized by Michael Jackson.

Therefore, the question is how do you copyright a dance? As mentioned prior, the U.S. Copyright Law has established protection for choreographed works, but in order for a choreographer to have standing in the court, they must register the work with the U.S. Copyright Office. However, to register the work, a choreographer must have the original work documented in a fixed and tangible medium.

The elements of a copyrightable dance work includes “rhythmic movements of one or more dancers’ bodies in a defined sequence and a defined spatial environment, such as a stage; a series of dance movements or patterns organized into an integrated, coherent, and expressive compositional whole; a story, theme, or abstract composition conveyed through movement; a presentation before an audience; a performance by skilled individuals; and musical or textual accompaniment” (U.S. Copyright Office).

For a choreographer, the complex issue is establishing what is original. According to Saucier (2018), there are two factors for choreographers to achieve an original dance. First, “the work is the independent creation of the choreographer.” This means that the dance cannot be categorized as a social dance.

According to the U.S. Copyright Circular 52, social dances includes ballroom dances, folk dances, line dances, square dances, and swing dances.

The second factor is “that the work exhibits some degree of creativity.” While determining what is original and creative is difficult, a choreographer could consult or collaborate with other experts in the field to best determine originality and creativity. The U.S. Copyright Office does provide information on several types of body movements that are not eligible for copyright protection, such as yoga and even a touchdown celebration are body movements not covered by copyright laws.

Furthermore, a somewhat difficult aspect of dance copyright is the fixed and tangible medium. Most dances are often created for a small number of performances, which most choreographers may not video record as the tangible medium. In addition, some choreographers may not use dance notation, which is a written documentation that could be registered with the U.S. Copyright Office. Another way dance can be fixed to a tangible medium is through still images or textual descriptions. Often, the inability to document and submit the work for copyright is the issue several choreographers have in defending their works in the court systems.

Once the choreographed work has been fixed to a medium it is technically copyrighted, but for full protection under the U.S. Copyright Law, the work needs to be registered with the U.S. Copyright Office in order to gain support of the court system. As Saucier (2018) mentioned, the purpose for the registration is to give the choreographer the right to reproduce their work, prepare derivatives of the work, distribute the work for sale or license the work, allow the work to be performed publicly, and “the right to display a copy of the dance by means of a film or slide or television image.”

While there is not a major dance copyright infringement case that has rivaled certain music or computer software infringement suits in terms of monetary settlements, there are few cases regarding copyright infringement on choreographed works that are significant. The two major copyright trial cases since 1976 included the famous 20th century choreographers George Balanchine and Martha Graham.

Fuller vs. Bemis

Before choreography was included into copyright, Kraut (2016) described a case from 1892 regarding the choreographer and dancer, Loie Fuller that filed a lawsuit against a former



dancer Minnie Bemis. As a dancer touring the vaudeville and burlesque venues, Fuller created the *Serpentine Dance* in 1891 for the play *Quack, M.D.*

During the time period, she performed her dance at different theatrical venues, which she often fought for better contract agreements with theater managers. She even sought compensation and attribution for her likeness image, which the theaters used to promote the venue and her signature *Serpentine Dance*. Following a failed attempt to sue a theatrical company for breach of contract, she left the play *Uncle Celestin*. The production company then hired Minnie Bemis to replace Fuller and perform the *Serpentine Dance*. This led to Fuller suing Bemis for copyright infringement.

Fuller had attempted to copyright the performance through a textual description of the dance that included her costume and how it was used in the dance. Two copies were mailed to the Library of Congress in May 1892, along with the fifty cents for the copyright registration. Unfortunately for Fuller, the costume description in the registration was considered a *skirt dance* or Nautch dancing, a colonist term for Indian dance.

Eventually, the U.S. Circuit Court rejected her claim of copyright infringement. Judge E. Henry Lacombe ruled on June 10, 1892 that Fuller's description of the dance described "The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition" (Kraut, 2016, p. 73). This case provided an idea of the early history of the relationship between choreography and copyrights that are being introduced more in the court systems recently.

Fortnite Lawsuit

For example, the leading video game company Epic Games that produced the popular *Fortnite* video game in 2017 has been sued by rapper 2 Milly for the "Swipe It" dance and the Instagram influencer the Backpack Kid for the "Floss Dance," as well as Alfonso Ribeiro, the actor who portrayed Carlton from the 1990s television sitcom *The Fresh Prince of Bel-Air* for the "Carlton Dance." These celebrities sued Epic Games for the use of dances in the video game.

The lawsuits claimed that the video game allowed users to purchase specific dances that were used during the game. According to Hamandi and Nelson (2020), "The third-person shooter allows players to buy and perform in-game dances or 'emotes' that largely draw from relevant pop-culture. Parties claiming they have invented, or first performed, the dance on which an 'emote' is based have filed multitude of copyright law suits against Epic Games, the publishers, and developers of Fortnite."

In 2018, the lawsuits were filed and the plaintiffs had to establish if the dances were copyrighted and registered with the U.S. Copyright Office. As noted prior, the key to dance copyright protection is that the work is registered at the Copyright Office, which none of the dances were registered at the time. Following a U.S. Supreme Court decision in the *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, those filing a copyright infringement suit, must have the work registered with the U.S. Copyright Office. Prior, a person could apply for copyright protection after filing the lawsuit, which could take several months.

While the concept that the work must be registered before an infringement case can be filed has become complex, especially considering the vague description and requirements of copy-

righting a dance work. The other aspect is the cost and time to register creative works with the U.S. Copyright Office.

In the case of Fortnite, the defendants filed a motion to dismiss in February 2019 based on the dance moves being too simple, and therefore the dances could not be copyrighted in accordance to the 1976 Copyright Law. To support the motion, the defense presented "correspondence with the court at that time that showed Ribeiro's claim had been denied by the Copyright Office, which decided the Carlton was only a 'simple dance routine' and thus couldn't be copyrighted" (Gach, 2019). Yet, the "Floss" dance was registered as a choreographed work and dismissed (Hamandi & Nelson, 2020).

There were other lawsuits against Epic Games, including two basketball players from the University of Maryland, which was also dismissed based on two factors. First, the works not being copyrighted prior to the lawsuit did hinder the plaintiffs' case in seeking protection for their dance works. Second, entire copyrighted dances are protected under copyright law, not individual dance moves, which the "emotes" in Fortnite used a short segment of the dances.

The Issues with Choreographic Works and the U.S. Copyright Law

Based on the court's decision, the ability to protect choreographed works is complex and difficult. As mentioned earlier, choreographers have the challenge to document a dance onto a fixed and tangible medium, meet the requirements for registration from the U.S. Copyright Office, and to defend their works. The Fortnite case clearly indicates the difficulties choreographers have protecting their work.

In addition, the lack of court decisions and briefs regarding choreographed works are limited, which indicates choreographers are not taking advantage of the 1976 copyright law to protect choreographed works. According to Krakower (2018), "Since the *Copyright Act's* enactment, which included protection for choreography, few choreographers have asserted this hard-won legal right. Many choreographers seem to pass on taking legal action when faced with the daunting task of understanding how to make a claim, and then navigating through entrenched copyright law defenses."

Krakower (2018) noted that more can be done to protect these works. She stated, "its lack of definition and minimal case law leaves gaping questions for any future litigants. For better protection of choreography, Congress should tighten up the statute by providing a more concrete definition that does not require a narrative or plot element to ensure the greatest American choreographers and their progeny are adequately protected." Krakower also addressed the need for further clarification on fair use in regards to choreographed works, which was the issue involving the Fortnite lawsuit.

Further research is needed in order for librarians and publishers to collaborate and support our dance communities. This wonderful art form can be better promoted, preserved and archived once we are able to better understand, advocate, and navigate the legal issues surrounding the creative world of dance.

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Questions & Answers – Copyright Column

Column Editor: **Will Cross** (Director of the Open Knowledge Center and Head of Information Policy, NC State University Libraries) <wmcross@ncsu.edu> ORCID: 0000-0003-1287-1156

QUESTION: *A researcher asks, “What happened in the Access Copyright case?”*

ANSWER: *York v. Access Copyright*, 2021 SCC 32, has been one of the most closely watched Canadian copyright cases in higher education. Sometimes compared to the litigation around Georgia State University’s electronic reserve system and the Copyright Clearance Center’s blanket license in the United States (*Cambridge University Press v. Becker*, 863 F.Supp.2d 1190 (N.D. Ga. 11 May 2012)), the case dealt with core questions about the role of copyright exceptions in academic libraries supporting their educational mission.

The case considered an attempt by Access Copyright, a collective society who licenses access to copyright materials, to enforce a tariff against York University in order to collect royalties for copying done as part of York’s educational mission. York argued that copies made for students enrolled in courses were permitted under fair dealing. A trial judge found the tariff enforceable against York but the Court of Appeals reversed, holding that the tariff was voluntary and thus not enforceable.

The Supreme Court of Canada agreed with the Court of Appeals and held that, since the tariff was not mandatory York had no obligation to pay. Further, because Access Copyright was not the rightsholder for most of the works at issue it had no standing to bring an infringement claim. York also argued that the copying was permitted under fair dealing in reliance on a set of institutional fair dealing Guidelines. While the Supreme Court declined to rule on the fair dealing issue, it did go out of its way to endorse the role of guidelines, writing that “There is no doubt...that guidelines are important to an educational institution’s ability to actualize fair dealing for its students.” The Court also explicitly endorsed “copyright’s public interest goals” and noted that “the public benefits of our system of copyright are much more than a fortunate by-product of private entitlement.” Instead, “increasing public access to and dissemination of artistic and intellectual works...is a primary goal of copyright.”

As such, the Court concluded that “When teaching staff at a university make copies for their students’ education, they are not ‘hid[ing] behind the shield of the user’s allowable purpose

in order to engage in a separate purpose that tends to make the dealing unfair.” Instead, they are fulfilling their mission to engage with copyright in a way that balances the rights of creators and of the public.

As with the U.S. Georgia State decision and more recently, *Google v. Oracle*, this case is a powerful reaffirmation of the core public-serving character of copyright law and the special role that educational institutions play in copyright’s balance. As Professor Michael Geist wrote shortly after the decision was announced, “The decision removes any doubt that the Supreme Court remains strongly supportive of user’s rights in copyright and vindicates years of educational policy in shifting away from Access Copyright toward alternative means of ensuring compliance with copyright law.”

QUESTION: *A collections librarian asks, “What is going on with the recent Maryland eBooks bill?”*

ANSWER: Library struggles with licensing eBooks is nothing new. From disappearing copies of Orwell’s *1984* to titles that “self-destruct” after 26 checkouts, eBook access has often been confusing and fraught. Because libraries cannot rely on their rights under Section 109 to lend titles they have often been at the mercy of licenses that charge unreasonable rates for a single copy and that place burdensome limits on use by patrons. As a result, library groups from the American Library Association to Library Futures have advocated for sustainable models that support libraries and the public.

One response to these challenges is a recent bill (SB432) passed in Maryland that requires any publisher offering to license “an electronic literary product” to consumers in the state to also offer to license the content to public libraries “on reasonable terms” that would enable library users to have access. The law does not define “reasonable terms” and publishers retain broad discretion to define how they license materials as long as they do not discriminate against public libraries. Publisher groups such as the American Association of Publishers (AAP) have objected to the bill and in particular, to state legislatures taking action in this area, which they argue should be left to federal lawmakers.

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For libraries, this law offers one path for enabling their role as conduits for public access. As the AAP statement notes, it also highlights a strange intersection of public, primarily federal copyright law and private, often-state regulated contract law. Here, a state legislature is defining some of the terms for private agreements that exist in the shadow of federal and state copyright law. Whether this represents an inappropriate intervention by the state legislature that undercuts federal law or it represents an attempt to remedy private agreements that subvert copyright's baseline balance may depend on your pre-existing assumptions about the purpose of copyright law itself. Either way, the Maryland eBook bill is not a silver bullet for the larger complexities of digital lending and information policy, but it may be a first step in recentring copyright's public-serving role rather than leaving libraries at the mercy of private law agreements, as they too often have been for the past two decades.

QUESTION: *A graduate student asks, "What is legislative history and how does it impact copyright law?"*

ANSWER: Legislative history is a term that refers to the documents that are produced by Congress as a bill is introduced, studied, and debated. These legislative documents - including committee reports and debates as well as various versions of a bill - are often used by attorneys and courts in an attempt to determine Congressional intent or to clarify vague or ambiguous statutory language.

The appeal of reliance on legislative history is obvious: referencing the discussions and materials that were involved in the passage of a law can potentially shed new light — or more cynically, produce support for an argument in favor of a particular reading of a law. On the other hand, legislative history can be limited and even misleading since it reflects the process of deliberation conducted by a large group of people with differing and often conflicting views. After all, the statutory language is the only thing that a majority of legislators have actually agreed on; everything else contained in the history simply documents the process used to reach that decision. For this reason, legislative history is generally considered persuasive authority, meaning that a court can consider it but is not bound by anything in the documents.

In copyright, legislative history can be quite useful since so much of copyright law is governed by statutes. This is particularly true in areas that are rarely litigated such as library copying under Section 108 and educational use under Section 110. On the other hand, legislative history here contains the same pitfalls as in other areas of the law. For example, a practitioner seeking to understand whether the requirement that certain kinds of works copied under the Technology Education and Copyright Harmonization (TEACH) Act be "reasonable and limited portions" might turn to the legislative history of 17 USC 110(2). What they would find, however, is that there is language in the legislative history supporting both the idea that a "reasonable and limited portion" can never constitute an entire work *and* language that says exactly the opposite: that a "reasonable and limited portion" could, in some circumstances, include an entire work. Which language is more persuasive may ultimately come down to your policy preference on the issue.



Nevertheless, legislative history provides an important window into the process of creating the law and can be a useful tool for understanding and interpreting the law. One excellent resource for legislative history is the LIPA – Copyright Legislative Histories hosted at the University of New Hampshire: <https://ipmall.law.unh.edu/content/lipa-copyright-legislative-histories>.

QUESTION: *A publisher asks, "I've been hearing stories about copyright lawsuits based on misuse of Creative Commons licensed work. What's going on?"*

ANSWER: Copyright trolling — the practice of opportunistic threats of litigation based on copyright's high statutory damages — has been a well-documented issue for years. In the past, however, trolls like Righthaven LLC generally purchased rights to existing all-rights-reserved works such as newspaper articles and photographs for the purpose of shaking down unsuspecting users.

A recent variation documented by Professor Daxon Stewart, however, leverages openly licensed work to generate litigation. In his recent article "Rise of the Copyleft Trolls: When Photographers Sue After Creative Commons Licenses Go Awry" (see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3844180) Stewart documents more than 30 cases "involving photographers suing after a Creative Commons license terminated." These trolls have often targeted users who have used a Creative Commons-licensed photograph of dubious commercial value but failed to provide proper attribution as required by the license. Without appropriate attribution, users cannot rely on the open license and, the trolls argue, should therefore be liable for the large statutory damages provided under copyright law.

The good news, as reported by Stewart, is that courts very often find that the users can still rely on fair use to support their use. Nevertheless, this opportunistic abuse of open licenses has raised concerns, including with the Creative Commons, which released a set of Statement of Principles Around License Enforcement for public comment in August. While the principles have limited legal weight, they are a strong statement from the organization that "enforcement of

the licenses should be a way of making sure that creators are treated fairly, not a scheme to trap well-meaning reusers who would be willing to correct errors." As of this writing, Creative Commons offers three core principles:

1. The primary goal of license enforcement should be getting reusers to comply with the license;
2. Legal action should be taken sparingly; and
3. Enforcement may involve financial recovery, but should not be a business model.

There can be no disagreement that users of openly-licensed materials should honor the licenses they rely upon. The Creative Commons principles offer a path to assuring that fear of punitive and opportunistic enforcement will not be a deterrent for those seeking to use the materials in good faith. You can read the full set of principles and offer your own comments here: https://docs.google.com/document/d/1bunttwLFQmc4y-nh-TX2w7hIX_5KgTZlgzlpNfwldWs/edit. 🐼