NOTE

Can Choreography and Copyright Waltz Together in the Wake of *Horgan v. Macmillan, Inc.*?

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INTRODUCTION

American statutory copyright law did not protect abstract choreography[1] until Congress passed the Copyright Act of 1976.[2] For the first time in U.S. history, the Copyright Act specifically listed choreography as a protected art form.[3] Ten years later, *Horgan v. Macmillan, Inc.*[4] provided the first, and so far only, opportunity for an appellate court to consider current copyright law in relation to this unique[5] form of expression.[6]

Horgan is an important case for several reasons. First, *Horgan* ushers in a new era of case law that will recognize choreography as a separate art form worthy of copyright protection.[7] Historically, copyright law did not reward choreographers and other fine artists

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[1] Choreography is the art of creatively assembling movements such that the final work has meaning, style, and form. PEGGY VAN PRAAGH & PETER BRINSON, THE CHOREOGRAPHIC ART 3 (1963) [hereafter VAN PRAAGH & BRINSON]. "Abstract choreography" is choreography that does not tell a story. *See* Fuller v. Bemis, 50 F. 926, 929 (C.C.S.D.N.Y. 1892) (denying protection to abstract dance piece because work contained no story). For more information on what choreography is, and how to produce and criticize it, see KATHERINE S. WALKER, DANCE AND ITS CREATORS (1972). For information on post-modern dance and influential choreographers of the 1960s and 1970s, see SALLY BANES, TERPSICHORE IN SNEAKERS (1980). For a practical look at how to produce choreography, see DANCE: THE ART OF PRODUCTION (Joan Schlaich & Betty DuPont eds., 1977). A leading dance reviewer presents a compilation of reviews of works by prominent choreographers in JACK ANDERSON, CHOREOGRAPHY OBSERVED (1987).

[2] 17 U.S.C. §§ 101-810 (1976).

[3] *Id.* § 106. The Copyright Act of 1976 specifically includes "choreographic works [and] pantomimes" in its list of protected works. *Id.*

[4] 789 F.2d 157 (2d Cir. 1986).

[5] *See* Leslie E. Wallis, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1444-45 (1986) (pointing out uniqueness of choreography and urging novel treatment under law). Unlike any other form of expression, choreography involves the use of bodily movement and stillness, movement patterns, shape, rhythm, music, time, and space. *See* Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. the Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 299 n.50, 300 (1984).

[6] *See Horgan*, 789 F.2d at 160 (recognizing this as case of first impression); *see also* Anne K. Weinhardt, *Copyright Infringement of Choreography: The Legal Aspects of Fixation*, 13 J. CORP. L. 839, 844 (1988) (recognizing *Horgan* as first and only case involving infringement of choreography under Copyright Act).

[7] *See infra* notes 36-52 and accompanying text (discussing how historically law did not recognize choreography as separate art form worthy of copyright protection).

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equally.[8] The plight of choreographer Agnes de Mille[9] illustrates this inequity.[10] She choreographed the musical *Oklahoma!* at a time when copyright protection was unavailable to choreographers.[11] In various adaptations that have used her choreography, the musical has earned over $60 million.[12] *Oklahoma!*'s producers initially paid de Mille $15,000, but she received no royalties for the work.[13] In contrast, the creators of *Oklahoma!*'s musical score, Rogers and Hammerstein, still receive royalties every time a tune from the musical is played on radio or television, or in front of a live, paying audience.[14]

The second reason *Horgan* is important is that no other legal precedent applies modern copyright laws to choreography.[15] The *Horgan* court's treatment of choreography currently serves as the only judicial guidepost for interpreting the meaning of choreography under the Copyright Act.[16] Finally, *Horgan* is significant because the Second Circuit Court of Appeals, which has considerable expertise in copyright law,[17] decided the case.[18]

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8 *See* Melanie Cook, *Moving to a New Beat: Copyright Protection for Choreographic Works*, 24 UCLA L. REV. 1287, 1287 n.4 (1977); *infra* notes 9-14, 36-52 and accompanying text (discussing unequal treatment of choreographers under law).

9 Agnes de Mille, an American born in 1909, choreographed for Broadway productions as well as for the American Ballet Theatre, Ballet Russes de Monte Carlo, and the Royal Winnipeg Ballet. *See* WALKER, *supra* note 1, at 198.

10 *See* Cook, *supra* note 8, at 1287 n.4 (using de Mille's plight to illustrate inequity).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *See supra* note 6 and accompanying text (explaining that *Horgan* is only case applying 1976 Copyright Act to choreography).

16 Horgan v. Macmillan, Inc., 789 F.2d 157 (2d Cir. 1986). For an analysis of the impact of the court's opinion, see *infra* notes 206-16 and accompanying text.

17 The Second Circuit has decided a number of influential copyright cases. *See, e.g.*, Walker v. Time Life Films, 784 F.2d 44 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986); Warner Bros. v. American Broadcasting Co., 720 F.2d 231 (2d Cir. 1983); Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977); Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1930).

18 *Horgan*, 789 F.2d at 157.

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In *Horgan*, the executrix of George Balanchine's[19] estate brought a copyright infringement suit against the authors of a book entitled *The Nutcracker: A Story & A Ballet*.[20] The book contained some sixty photographs of *The Nutcracker Ballet*[21] as performed by the New York City Ballet.[22] The principal question on appeal was whether still photographs of *The Nutcracker Ballet* infringed the copyright of the choreographer, George Balanchine.[23] The appellate court held that photographs could infringe a choreographer's copyright.[24] The appellate court's opinion, however, failed to clearly define choreography.[25] The court's inadequate definition makes it difficult to determine choreographic copyright infringement.[26]

This Note examines the *Horgan* appellate court's analysis of the relationship between choreography and copyright. Part I discusses the historical background of the relationship between choreography and copyright.[27] Part II presents the trial and appellate courts' treatments of the case.[28] Part III analyzes the problems and weaknesses of the appellate court's opinion[29] and discusses the impact that these deficiencies will have on choreography as a whole.[30]

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19 George Balanchine, originally from Russia, came to the United States and cofounded the New York City Ballet in 1948. *See* MARGOT FONTEYN, THE MAGIC OF DANCE 197 (Alfred A. Knopf ed., 1979). Commentators have referred to Balanchine as a genius, as well as an artist of Picasso's caliber. *Horgan*, 789 F.2d at 158 n.1. Balanchine choreographed his version of *The Nutcracker Ballet* in 1954. *Id.*

20 *Horgan*, 789 F.2d at 158.

21 *Id.* Balanchine choreographed *The Nutcracker Ballet* and set it to music by Tchaikovsky. *Id.* The ballet is an adaptation of "The Nutcracker and the Mouse King," an old Russian folktale by E.T.A. Hoffman. *Id.* The ballet is also an adaptation of a ballet that the Russian Ivanov previously choreographed. *Id.*

22 *Id.* at 159.

23 *Id.* at 160.

24 *Id.* at 163.

25 *Id.* at 161-63. For an analysis of the court's treatment of the definition of choreography, see *infra* notes 141-89 and accompanying text.

26 For an analysis of the definition's impact, see *infra* notes 206-16 and accompanying text.

27 *See infra* notes 33-99 and accompanying text (discussing historical background of choreography and copyright).

28 *See infra* notes 100-35 and accompanying text (presenting both courts' treatments of case).

29 *See infra* notes 136-205 and accompanying text (discussing weaknesses of appellate court's opinion).

30 *See infra* notes 206-16 and accompanying text (discussing impact of appellate court's analysis).

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Finally, Part IV sets forth an alternative definition of choreography.[31] The alternative definition would help solve some of the problems raised by the appellate court's opinion.[32]

I. History of Choreography in Relation to Copyright Law

American cases first applied common-law copyright rules to choreography in the 19th century.[33] The early cases involving choreography and copyright reflect the courts' unwillingness to extend copyright law to abstract choreography.[34] Subsequent developments in copyright law have broadened the scope of copyright protection to abstract choreography.[35]

A. Early Restrictions

Historically, choreographers had more difficulty obtaining copyright protection than their counterparts in music[36] and literature[37] for two reasons. First, Congress' power to protect artistic works of authorship extends only to those arts that lawmakers consider useful to society.[38] Before 1976, neither Congress nor the courts found abstract choreography worthy of copyright protection.[39]

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[31] *See infra* notes 217-35 and accompanying text (suggesting alternative definition of choreography).

[32] *See infra* notes 236-45 and accompanying text (discussing how alternative definition would help solve problems raised by appellate court's opinion).

[33] *See* Fuller v. Bemis, 50 F. 926, 929 (C.C.S.D.N.Y. 1892) (denying recovery to choreographer because no story present in work); Martinetti v. Maguire, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9,173) (denying recovery to choreographer because work unworthy of protection).

[34] *See infra* notes 36-52 and accompanying text (discussing historical restrictions placed on choreographers' copyrights).

[35] *See infra* notes 53-59 and accompanying text (discussing how modern developments in copyright law broadened scope of choreographic copyright protection).

[36] The Copyright Act provides protection for musical compositions. *See* 17 U.S.C. § 102(a)(2) (1988 & Supp. IV 1992).

[37] The Copyright Act provides protection for written works. *See id.* § 102(a)(1).

[38] The United States Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective writings . . . ." U.S. Const. art. I, § 8, cl. 8.

[39] *See, e.g.*, Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 § 5(d) [hereafter 1909 Copyright Act] (not placing choreography on list of protected works); Savage v. Hoffmann, 159 F. 584 (C.C.S.D.N.Y. 1908) (denying protection to abstract choreographic work).

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Courts interpreted the "useful" requirement as an invitation to examine the moral worth of works.[40] Early courts did not view works of choreography as sufficiently moral to warrant protection.[41] The widely held view that dance was immoral was one reason why choreography did not share the elevated artistic status of other fine arts that lawmakers deemed worthy of copyright protection.[42]

A second reason courts denied abstract choreography protection before 1976 was that the law restricted copyright protection to pieces with dramatic content.[43] Under common law and the 1909 Copyright Act,[44] effective until 1978,[45] choreographers' works had to be "dramatic" or "dramatico-musical" compositions to gain copyright protection.[46] Therefore, to qualify for copyright protection, choreographic works had to tell a story, be a part of a dramatic

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40 Singer, *supra* note 5, at 299.

41 *See* Martinetti v. Maguire, 16 F. Cas. 920, 922 (C.C. Cal. 1867) (No. 9,173) (refusing copyright protection to creator of ballet with dialogue because court viewed work as immoral exhibition of women lying around on stage). The *Martinetti* court reasoned that the exhibition of such a drama promoted the progress of neither science nor the useful arts. *Id.* The court concluded that the Constitution did not authorize the protection of such productions. *Id.*; *see* Barnes v. Miner, 122 F. 480, 492 (C.C.S.D.N.Y. 1903) (refusing copyright protection to work involving women in dialogue changing clothes on stage).

42 Leon I. Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 806-07 (1952); Singer, *supra* note 5, at 299 n.52; *see also Martinetti*, 16 F. Cas. 920, 922 (denying copyright protection to "indecent" ballet); Dane v. M & H Co., 136 U.S.P.Q. (BNA) 426 (N.Y. Sup. Ct. 1963) (denying copyright protection to military/striptease audition number for stage version of "Gypsy"). The *Dane* court stated that an audition number did not tend to promote the progress of science or the useful arts because it contained nothing of a literary, dramatic, or musical character. *Id.* at 429. The *Dane* court suggested that to qualify for protection, the number would have to elevate, cultivate, inform, or improve the moral or intellectual natures of the audience. *Id.*

43 *See Barnes*, 122 F. at 480 (denying protection to dialogue and ballet containing no dramatic content); Fuller v. Bemis, 50 F. 926, 929 (C.C.S.D.N.Y. 1892) (denying protection to abstract dance piece because work contained no story); *Martinetti*, 16 F. Cas. at 922 (denying protection to exhibition with no story or dramatic content).

44 1909 Copyright Act, 35 Stat. 1075. The current version of the statute is 17 U.S.C. §§ 101-810 (1988 & Supp. IV 1992).

45 17 U.S.C. §§ 101-810. The Copyright Act of 1976 became effective January 1, 1978. *Id.*

46 1909 Copyright Act, 35 Stat. 1075. *See also Fuller*, 50 F. at 929 (holding that dramatic composition should tell story to receive common-law copyright protection).

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work, or convey a dramatic idea.[47] This requirement effectively denied copyright protection to experimental, abstract choreography.[48] Although the 1909 Copyright Act provided copyright protection for abstract musical works[49] and paintings,[50] it excluded the abstract works of choreographers.[51] Therefore, the law treated artists of equivalent influence in their respective arts unequally.[52]

As modern dance developed and commanded more respect as an American art form,[53] some legal commentators recognized that

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47 *See* Patricia Solan Gennerich, *One Moment in Time: The Second Circuit Ponders Choreographic Photography as a Copyright Infringement*, 53 BROOK. L. REV. 379, 379 (1987) (stating that under 1909 Copyright Act choreographers could not receive protection unless work told story, was part of dramatic work, or conveyed proper moral tone); Mirell, *supra* note 42, at 800-12 (stating that choreographers could not receive protection for abstract works under 1909 Copyright Act).

48 *See Fuller*, 50 F. at 926 (denying protection to abstract choreography). American abstract choreographer Marie Louise Fuller was the plaintiff the court denied protection to in the *Fuller* case. *Id.* Although the avant-garde group in Paris was Fuller's primary audience, she toured America performing novel movement in gauzy fabrics with imaginative lighting. DANCE AS A THEATRE ART 118-19 (Selma Jeanne Cohen ed., 1974); *see* FONTEYN, *supra* note 19, at 92. Fuller, now regarded as a modern dance pioneer, helped make toe shoes and ballet skirts look old-fashioned. *Id.* at 95. However, she was unsuccessful in claiming infringement of one of her dances because it did not tell a story. *See Fuller*, 50 F. at 929. Other modern choreographers whose works do not always contain a story include Merce Cunningham, Martha Graham, Alvin Ailey, and Twyla Tharp. Gennerich, *supra* note 47, at 379-80. Although Balanchine's *The Nutcracker Ballet* tells a story, most of his ballets are plotless. George Balanchine, *Work in Progress*, *in* DANCE AS A THEATRE ART, *supra*, at 187, 188. Thus, neither common law nor the 1909 Copyright Act would have protected most of Balanchine's ballets.

49 *See* 1909 Copyright Act, 35 Stat. 1075 (failing to provide story-telling requirement for musical works).

50 *Id.* (providing no story-telling requirement for paintings).

51 *See supra* notes 47-50 and accompanying text (discussing how 1909 Copyright Act failed to protect abstract choreographic works).

52 Cook, *supra* note 8, at 1287 n.4.

53 Starting with choreographers Ruth St. Denis and Ted Shawn, modern dance began to become more popular in the United States. *See generally* FONTEYN, *supra* note 19, at 106-13 (discussing development of American modern dance from Ruth St. Denis and Ted Shawn to Martha Graham); DANCE AS A THEATRE ART, *supra* note 48, at 119-22 (discussing historical development of modern dance from Ruth St. Denis to Doris Humphrey and Martha Graham). Commentators have called Martha Graham the "Mother of Modern Dance." *See, e.g.*, FONTEYN, *supra* note 19, at 108. Her career began in Ruth St. Denis and Ted Shawn's company. *Id.* at 111. Later she developed her own distinct technique. *Id.* By the early 1970s, before the 1976 Act, many

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restrictions on choreographic copyright protection were too severe.[54] Accordingly, the commentators proposed that Congress broaden the scope of choreographic copyright protection.[55] For many years, however, Congress rejected proposals to add choreography to the list of protected forms of expression.[56] Finally, Congress recognized choreography as a valuable and protectable art form when it passed the Copyright Act of 1976.[57]

B. Rights and Requirements Under the Copyright Act of 1976

Congress broadened the scope of choreographic protection considerably when it included choreographic works as a separate copyrightable form of expression in the Copyright Act of 1976 (the Act).[58] The Act now protects non-dramatic choreographic works.[59] Although choreographic works no longer must tell a story to gain copyright protection, they must meet two other requirements. To warrant protection under the Act, a choreographic work must be

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universities had implemented dance departments and offered degrees in dance. *See* WALTER TERRY, THE DANCE IN AMERICA 236-37 (rev. ed. 1973).

54 *See, e.g.*, Mirell, *supra* note 42, at 804 (recognizing that restrictions on choreographic copyright protection were too severe).

55 *See id.* (submitting that copyright law is too restrictive because of story-telling requirement). Mirell proposed expanding legislation with a separate category of protected works that specifically mentioned choreography. *Id.* at 814. In 1959, even the notable choreographer Agnes de Mille requested that the Copyright Office give choreographers some chance to protect their basic rights. *See* Singer, *supra* note 5, at 289 n.9 (citing Letter from Agnes de Mille to United States Copyright Office (Nov. 10, 1959), *in* B. VARMER, Study No. 28, *Copyright in Choreographic Works* 65 (1959) [hereafter Letter from Agnes de Mille]). In 1961, the Copyright Office also recommended that Congress amend the law to provide protection for abstract choreography. REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 150 (Comm. Print 1961).

56 Horgan v. Macmillan, Inc., 789 F.2d 157, 160 (2d Cir. 1986).

57 *Id.*

58 *Id.* at 161.

59 *Id.* (citing *The Compendium of Copyright Office Practices*, COMPENDIUM II § 450.1 (1984) [hereafter COMPENDIUM II] (stating no story-telling requirement exists to gain copyright protection under Copyright Act)). Finally, abstract choreographers such as Merce Cunningham, Alvin Ailey, and Twyla Tharp have statutory protection available for their abstract works. *See* Gennerich, *supra* note 47, at 379-80. The Act also protects choreographed movement other than dance, such as movement in marching band parades and ice figure skating programs. Martha M. Traylor, *Choreography, Pantomime and the Copyright Revision Act of 1976*, 16 NEW ENG. L. REV. 227, 229 (1981).

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both original[60] and fixed in a tangible means of expression.[61] The originality requirement means that the choreographer must create the work with her own skill, labor, or judgment.[62] Generally, the fixation requirement means that the choreographer must record her work in a medium of expression that is permanent or stable enough to permit reproduction.[63]

When considering the originality of a choreographic work, commentators suggest that courts should look at the choreographer's treatment of rhythm, space, and movement.[64] Commentators also suggest that an analogy to music helps determine if a work satisfies the originality requirement.[65] Courts find originality in a musical composition if the composer injects some unique element into the piece.[66] Thus, a musical composition can satisfy the originality requirement even if it employs familiar rhythms or common note sequences.[67] Similarly, the use of familiar rhythms, patterns, and movements should not preclude courts from finding originality in choreographic pieces.[68] Courts should find originality if the choreographer adds something new to the work and thereby gives the work her individual stamp.[69]

Generally, choreographers find it more difficult to meet the fixation requirement than the originality requirement because of the

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60 17 U.S.C. § 102(a) (1988 & Supp. IV 1992).

61 *Id.* § 102(a).

62 Singer, *supra* note 5, at 300; *see also* Alfred Bell Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2d Cir. 1951) (finding originality because plaintiff made work with own skill); Northern Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (finding originality because artist made musical composition with own labor).

63 *See* 17 U.S.C. § 101 (1988 & Supp. IV 1992) (explaining fixation requirement).

64 Singer, *supra* note 5, at 300.

65 *Id.*

66 *Id.*

67 *See* Hein v. Harris, 175 F. 875, 877 (C.C.S.D.N.Y. 1910) (finding originality even though plaintiff's work employed familiar rhythms), *aff'd*, 183 F. 107 (2d Cir. 1910). *See generally* Darrell v. Joe Morris Music Co., 113 F.2d 80 (2d Cir. 1940) (holding that musical composition qualified for copyright protection despite composition's use of note sequence recurrent in many other pieces).

68 Singer, *supra* note 5, at 300; *see also Hein*, 175 F. at 877 (finding originality even though plaintiff's work employed familiar rhythms).

69 Singer, *supra* note 5, at 300-01.

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unique, fleeting nature of dance.[70] Unfortunately, none of the available means of fixation — video, written notation, or computer graphics — is entirely satisfactory.[71] Video, perhaps the most popular means of fixation, requires special equipment and fails to capture subtle movements and the three-dimensionality of dance.[72] Written dance notation provides extreme accuracy in terms of body positions, spatial relationships, and timing.[73] Notation, however, fails to convey the choreographer's style and interpretation.[74] Furthermore, few people know dance notation, and notation experts are very expensive to employ.[75] The third method of fixation, computer graphics, accurately records body positions, spacing, and timing, but is not widely available and is financially prohibitive for most choreographers.[76]

Finally, because dance is fundamentally an art performed and appreciated live,[77] some choreographers view fixation as an impractical, even degrading technicality.[78] The dynamic nature of dance

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[70] *See* Balanchine, *supra* note 48, at 192. Balanchine stated that his ballets were for "today's bodies," not for future generations. *Id.* He emphasized that he did not want his ballets preserved as museum pieces. *Id.* When an interviewer asked Balanchine about the preservation of his ballets, he responded, "They don't have to be preserved. Why should they be? I think ballet is NOW. It's about people who are NOW. Not about what will be. Because as soon as you don't have these bodies to work with, it's already finished." *Id.*

[71] *See* Singer, *supra* note 5, at 301 (stating that none of available methods of fixation is satisfactory); Traylor, *supra* note 59, at 245-46 (discussing fixation methods' shortcomings); Wallis, *supra* note 5, at 1446-47 (arguing that means of fixation are inadequate for choreographers).

[72] *See* Singer, *supra* note 5, at 302-03 (summarizing shortcomings of video). *See generally* Wallis, *supra* note 5, at 1463 (noting that although popular, video is not wholly adequate method of fixation because it captures only one defined angle of perception). Furthermore, video captures the interpretation of the performer and the camera operator, as well as the choreographer. *Id.*

[73] Singer, *supra* note 5, at 301 n.63.

[74] *Id.* at 301-02.

[75] *Id.*; *see also* Wallis, *supra* note 5, at 1462 (discussing need for costly expert).

[76] *See* Wallis, *supra* note 5, at 1462-64 (discussing computer graphics as means of fixation).

[77] *See* Traylor, *supra* note 59, at 237 (discussing how choreography is generally performed before live audience).

[78] *See id.* (stating that choreographers view fixation as impractical and a means by which people may "pirate" their work); *see also* Wallis, *supra* note 5, at 1464 (stating that fixation requirement is unrealistic burden on choreographer and stifles her creativity). *See generally id.* (stating that Martha Graham did not consent to videotaping her works until 1984). Wallis notes

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also gives choreographers less incentive to adequately fix their work than artists working in other mediums.[79] The choreographer is therefore more likely to rely on the customs of the dance world[80] to protect her work than she is to copyright it.[81]

However, if a choreographer chooses to fix her work, the Copyright Act confers on her several legally enforceable rights. The Act gives the owner of a choreographic copyright exclusive rights to reproduce the work,[82] create derivative works,[83] and perform the work publicly.[84] If the copyright owner believes that someone has infringed her exclusive rights, she may file suit against that person to prevent further infringement and recover damages.[85]

Generally, in a copyright infringement suit the owner of a copyright must prove two elements: copying and misappropriation.[86] To prove that the defendant copied her work, the plaintiff can show that the defendant had access to her work and that the defen-

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that choreographers can preserve pieces effectively through means other than fixation. *Id.* at 1460-61. Traditionally, dancers have remembered pieces and passed them down through the generations. *Id.*

79 *See* Balanchine, *supra* note 48, at 192 (stating that preservation of ballet is unimportant because ballets are about "people who are NOW"); Wallis, *supra* note 5, at 1460-61 (stating that nature of dance gives choreographers less incentive to fix work than artists working in other mediums).

80 *See* Singer, *supra* note 5, at 299 (discussing customs of dance world that protect choreographers' works). The dance community shuns choreographers who steal other choreographers' work. *See* Traylor, *supra* note 59, at 237. Because choreographers rely on the somewhat small dance community for their audience, the threat of having the community condemn them can prevent choreographers from misappropriating other choreographers' works. *Id.*

81 *See* Traylor, *supra* note 59, at 237 (stating that choreographers are more likely to rely on dance community customs to protect works than they are to copyright pieces).

82 17 U.S.C. § 106(1) (1988).

83 *Id.* § 106(2).

84 *Id.* § 106(4) The owner of a choreographic copyright also has the exclusive right to display her work publicly. *Id.* § 106(5).

85 17 U.S.C. §§ 502, 504 (1988 & Supp. IV 1992). The plaintiff in *Horgan* sought injunctive relief to stop publication of a book that the plaintiff believed infringed Balanchine's copyright. Horgan v. Macmillan, Inc., 789 F.2d 157, 158 (2d Cir. 1986).

86 *See* Walker v. Time Life Films, 784 F.2d 44, 48 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986) (stating that plaintiff must prove copying and misappropriation). For simplicity, this Note outlines only a basic approach for determining copyright infringement.

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dant's work is substantially similar[87] to the plaintiff's copyrighted work.[88] To prove misappropriation, the plaintiff must show that the defendant unlawfully copied the protected elements of the plaintiff's work.[89] A copyright, however, does not protect all the elements of a work. For example, a copyright does not protect ideas[90] or other basic building materials of a work.[91] Therefore, the defendant might not be liable for copyright infringement if she uses the plaintiff's ideas or basic materials.[92]

Just as the defendant can lawfully copy unprotected elements of the plaintiff's work, the defendant can lawfully use any part of a copyrighted work for certain limited purposes.[93] Such lawful appropriation, or "fair use," is a defense to a copyright infringement suit.[94] Therefore, even if a defendant copies a valuable portion of the plaintiff's work, she may not be liable if her use of the plaintiff's work constitutes fair use.[95]

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87 *See infra* notes 125-29 and accompanying text (discussing substantial similarity test).

88 *Walker*, 784 F.2d at 48.

89 *See* Arnstein v. Porter, 154 F.2d 464, 472-73 (2d Cir. 1946) (stating that plaintiff can prove misappropriation by showing defendant copied valuable part of plaintiff's work).

90 *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (stating that copyrights extend only to expression, not to ideas expressed), *cert. denied*, 282 U.S. 902 (1930).

91 *See* Horgan v. Macmillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986) (stating that basic building materials are not copyrightable).

92 *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 217 (1954) (finding that defendant can copy idea of using statuettes as lamp base, but may not copy form of plaintiff's statuettes); *Nichols*, 45 F.2d at 121-22 (finding that defendant can copy plaintiff's idea because plaintiff's copyright does not cover idea).

93 17 U.S.C. § 107 (1988 & Supp. IV 1992). The use of a work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research does not constitute copyright infringement. *Id.*

94 *Id.* The doctrine of fair use is a defense and serves to limit the exclusive rights of the copyright owner. *Id.*

95 *Id.* Courts consider several factors in determining whether the fair use defense applies in a particular case. *Id.* These factors include the purpose of the use, the nature of the plaintiff's work, the amount of the plaintiff's work that the defendant copied, and the effect of the use on the potential market for the copyrighted work. *Id.* The *Horgan* appellate court instructed the trial court to consider a possible fair use defense on remand. *Horgan*, 789 F.2d at 163.

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Many choreographers who create copyrightable works choose to legally protect them under the Act.[96] George Balanchine was one of the first choreographers to attempt to enforce his rights under the Act.[97] In 1981, he fixed his version of *The Nutcracker Ballet*,[98] which was the choreographic work at issue in *Horgan*.[99]

II. *HORGAN V. MACMILLAN, INC.*

In 1985, two years after Balanchine's death, the publisher Macmillan & Company (Macmillan) released a book entitled *The Nutcracker: A Story and A Ballet*.[100] Many people collaborated on the book, including the author Ellen Switzer,[101] and the official New York City Ballet (NYCB) photographers Steven Caras and Costas.[102] Dancers in the company cooperated by giving interviews that the authors incorporated into the book.[103] The NYCB also cooperated by allowing the photographers to photograph the dancers during rehearsals.[104] Because Balanchine had been the artistic director of

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96 Singer, *supra* note 5, at 290. Within two years of the Act's effective date, 63 choreographic works and pantomimes received copyright protection from the Copyright Office. *Id.*

97 *See Horgan*, 789 F.2d at 158. Balanchine copyrighted *The Nutcracker Ballet* in 1981, only three years after the Copyright Act took effect in 1978. *Id.*

98 *Id.* Balanchine fixed his version of *The Nutcracker Ballet* by videotaping a rehearsal. *Id.*

99 *Id.*

100 *Id.* The authors of the book intended children to be its primary audience. *See* Gennerich, *supra* note 47, at 384. The book contained three major sections: the original folktale by E.T.A. Hoffman, the history of the tale as a ballet, and *The Nutcracker Ballet* as performed by the New York City Ballet. *Id.*

101 *Horgan*, 789 F.2d at 158. Switzer also wrote a book that Macmillan published, titled *Dancers! Horizons in American Dance*, which discussed dance and Russian and American companies and choreographers. *See* ELLEN SWITZER, DANCERS! HORIZONS IN AMERICAN DANCE (1982); Gennerich, *supra* note 47, at 384 n.28.

102 *Horgan*, 789 F.2d at 158. Caras danced with the New York City Ballet for seven years and even performed in *The Nutcracker Ballet* several times before becoming an official photographer for the company. *See* Gennerich, *supra* note 47, at 385 n.33. Costas was a math teacher as well as an accomplished dance photographer whose work had appeared in many newspapers and magazines. *Id.*

103 Gennerich, *supra* note 47, at 384. Switzer interviewed several dancers in *The Nutcracker Ballet* and incorporated their comments into a section of her book. *Id.*

104 *Id.*

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the NYCB for many years,[105] the authors may have assumed that the NYCB's cooperation in making the book indicated that Balanchine's estate would also support the book.[106]

When Balanchine's executrix, Barbara Horgan, heard of the book, however, she notified Macmillan that she objected to its publication.[107] She viewed the book as a derivative work[108] that infringed Balanchine's choreographic copyright.[109] Six months after the notification of objection, on October 11, 1985, Horgan filed suit against Macmillan, Switzer, Caras, and Costas.[110] Horgan alleged that the book infringed Balanchine's copyright and requested a temporary restraining order and preliminary injunction.[111]

The trial court denied both the order and the injunction.[112] Without employing the substantial similarity test, the trial court found that the photographs did not infringe Balanchine's copyright.[113] The trial court stated that choreography is essentially the movement of steps in a dance and that photographs merely catch dancers at specific instants in time.[114] Therefore, the court reasoned, photographs could not capture movement, which is the essence of choreography.[115] The trial court further found that the photographs neither intended to, nor actually did, record the

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105 FONTEYN, *supra* note 19, at 197.

106 *See generally Horgan*, 789 F.2d at 159 (discussing close ties authors of book had to NYCB).

107 *Id.* at 158.

108 Under the Copyright Act, a derivative work is a work based on one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. 17 U.S.C. § 101 (1988).

109 *Horgan*, 789 F.2d at 158. The estate sought to prevent publication of the book under § 106 of the Copyright Act. *Id.* Section 106 gives the copyright owner the exclusive right to prepare derivative works based on the copyrighted work. 17 U.S.C. § 106(2) (1988 & Supp. IV 1992).

110 *Horgan*, 789 F.2d at 158.

111 *Id.* at 159.

112 *Id.* at 160.

113 Horgan v. Macmillan, Inc., 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985), *rev'd*, 789 F.2d 157 (2d Cir. 1986). Generally, courts use the substantial similarity test to determine whether the plaintiff's and defendant's works are substantially similar. For a discussion of the substantial similarity test, see *infra* notes 125-29 and accompanying text.

114 *Horgan*, 621 F. Supp. at 1170.

115 *Id.*

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underlying choreography and that the photographs could not recreate the choreography.[116]

In addition to finding no copyright infringement, the trial court found that the estate had, without adequate justification, unduly delayed before seeking an injunction.[117] Horgan had notice of the defendants' intention to publish the book five months before she took legal action.[118] During this five-month delay, the defendants, by manufacturing and shipping 10,000 copies of the book, had changed their position to their economic detriment.[119] Based upon the delay and the absence of infringement, the trial court ruled against Horgan.[120]

On appeal, the Second Circuit determined that the trial court's standard — whether the photographs could recreate the choreography — was the wrong standard to determine choreographic copyright infringement.[121] The appellate court therefore remanded the case back to the trial court.[122] The appellate court held that the proper test for choreographic copyright infringement was the substantial similarity test.[123] The appellate court instructed the trial court to apply on remand the proper test for infringement and resolve the case on its merits.[124]

Although courts commonly use a substantial similarity test in copyright infringement cases,[125] no single definition of "substantial similarity" has emerged from the cases.[126] Moreover, courts apply

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116 *Id.* To support the theory that one could not recreate choreography from photographs, the court analogized to the impossibility of recreating a Beethoven symphony from a notation containing only every twenty-fifth chord of the symphony. *Id.*

117 *Id.*

118 Horgan v. Macmillan, Inc., 789 F.2d 157, 160 (2d Cir. 1986).

119 *See* Gennerich, *supra* note 47, at 387 n.41 (citing Brief for Appellees at 15, Horgan v. Macmillan, Inc., 789 F.2d 157 (2d Cir. 1986) (No. 85-7954)).

120 Horgan v. Macmillan, Inc., 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985).

121 *Horgan*, 789 F.2d at 162.

122 *Id.* at 164.

123 *Id.* at 162.

124 *Id.* at 163.

125 *See id.* at 162 (listing many cases that hold substantial similarity test is proper test for infringement).

126 *See* Michael Ferdinand Sitzer, Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 385-86 (1981) (arguing that substantial similarity is difficult, if not impossible, to define).

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the substantial similarity test inconsistently.[127] In *Horgan*, the appellate court articulated the standard as whether an ordinary observer, who viewed both the plaintiff's original work and the defendant's allegedly infringing work, would be disposed to overlook their disparities and perceive their aesthetic appeal as substantially the same.[128] The appellate court stated that even a small portion of the defendant's work, if qualitatively similar to the plaintiff's work, could constitute infringement.[129]

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127 *See* Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 722 (1987) (stating that there is no general agreement among courts as to exact meaning of substantial similarity). Cohen delineates three different ways courts approach the test and proposes a new test. *Id.* at 735-64. The "traditional approach" uses the ordinary observer standard and looks at overall aesthetic appeal. *Id.* at 737. The "Salkeld approach" uses the ordinary observer standard and looks at overall aesthetic appeal, but also requires the plaintiff to prove copying. *Id.* at 747. The "Krofft approach" involves a two-step process employed after the plaintiff initially proves access. *Id.* at 753. The first step is an extrinsic test looking for similarities in ideas; the second step is an intrinsic test looking for similarities in expression. *Id.* at 753-56. Cohen proposes a new test that calls first for proof of copying, then for justification of copying. *Id.* at 758-64.

128 *Horgan*, 789 F.2d at 162. The appellate court quoted the substantial similarity test's standard from an opinion written by Judge Learned Hand in Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). Judge Hand described the test as 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.* The Second Circuit later applied *Peter Pan Fabrics*' ordinary observer test and found substantial similarity where two fabric patterns would be "almost identical" to a lay observer. Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090, 1093 (2d Cir. 1977). Several other courts have also adopted the *Peter Pan Fabrics* test. *See, e.g.*, Kenbrooke Fabrics v. Holland Fabrics, 602 F. Supp. 151, 154 (S.D.N.Y. 1984) (utilizing *Peter Pan Fabrics* test and finding substantial similarity between two fabric patterns); Lauratex Textile Corp. v. Allton Knitting Mills, 517 F. Supp. 900, 902-03 (S.D.N.Y. 1981) (stating that fabrics' same overall effect supported finding of substantial similarity under test set forth in *Peter Pan Fabrics*).

129 *Horgan*, 789 F.2d at 162. In other cases, the Second Circuit has taken an "audience-confusion approach" to the substantial similarity test. *See* Novelty Textile Mills, 558 F.2d 1090 (finding substantial similarity between fabric designs because observers would tend to see two patterns as same, despite differences). The audience-confusion approach calls for a comparison of the two works in their entirety. Cohen, *supra* note 127, at 743 n.79. The audience-confusion approach finds infringement when an ordinary viewer would confuse the whole of the defendant's work for the whole of the plaintiff's work. *Id.* at 742. Conversely, the *Horgan* "value approach" emphasizes the aesthetic or financial value of the portion copied, rather than the amount copied. *Id.* at 741.

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After instructing the trial court to use the substantial similarity test on remand, the appellate court further instructed the trial court to determine several other issues.[130] First, the Second Circuit instructed the trial court to determine whether Balanchine's copyright was valid even though much of his material originated in the public domain.[131] Second, the appellate court instructed the trial court to determine whether the book contained a sufficient number of photographs to constitute infringement of Balanchine's copyright.[132] Finally, if the trial court found infringement, the appellate court instructed it to determine whether the doctrine of fair use[133] applied as a defense.[134] The trial court never resolved

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Nimmer presented two similar approaches to the substantial similarity test by distinguishing "fragmented literal similarity" and "comprehensive nonliteral similarity." 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03, at 13-30 to 13-57 (1993). Fragmented literal similarity exists when the defendant precisely copies specific elements of the plaintiff's work. *Id.* at 13-50. The issue in a fragmented literal similarity case is whether the defendant has taken a portion of the plaintiff's work sufficient to constitute infringement. *Id.* Both quantitative and qualitative factors are relevant to this determination. *Id.* at 13-52. Such analysis is analogous to Cohen's value approach. Cohen, *supra* note 127, at 744 n.81. Comprehensive nonliteral similarity exists when the defendant does not copy specific elements precisely, but instead takes an abstract of the whole of the plaintiff's work. NIMMER, *supra*, at 13-30. The issue in a comprehensive nonliteral similarity case is whether what the defendant has taken is an unprotected idea or protected expression. *Id.* at 13-30 to 13-32. The audience-confusion approach is one way to decide this issue. *See id.* at 13-39; Cohen, *supra* note 127, at 744 n.81.

130 *Horgan*, 789 F.2d at 162-63. For a comprehensive exploration of various issues that the appellate court requested the trial court to resolve on remand, see Gennerich, *supra* note 47, at 389-406 (theorizing how trial court might have resolved issues if parties had not settled out of court).

131 *Horgan*, 789 F.2d at 163. Balanchine failed to disclose that some of his work originated in the public domain. *Id.* The Russian choreographer Ivanov choreographed his own version of *The Nutcracker Ballet* before Balanchine's efforts. *Id.* at 158. Balanchine performed in Ivanov's production and stated later about his own production, "I knew all about *The Nutcracker* because I was in it. . . . I used all the music, and I used the story by Hoffman. . . . The Hoop Dance [Sugar Canes] is absolutely authentic, from Russia. Yes, I was in it — Mouse, Hoop — everything." NANCY REYNOLDS, REPERTORY IN REVIEW 157 (1976).

132 *Horgan*, 789 F.2d at 163.

133 *See supra* notes 93-95 and accompanying text (discussing fair use defense).

134 *See Horgan*, 789 F.2d at 163 (stating that photographs may be protected as fair use).

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these issues because the parties settled out of court after the Second Circuit's ruling.[135]

III. Analysis of the Appellate Court's Opinion

Although the appellate court's ruling never produced a resolution of *Horgan* on its merits, the opinion remains as precedent for future cases involving choreographic copyright infringement.[136] Unfortunately, the appellate court's opinion lacks clarity and strength in two areas. First, the court's definition of choreography is deficient.[137] The court's implication that movement is not central to choreography reflects a poor understanding of the art form.[138] Second, the substantial similarity test is amorphous and difficult to apply.[139] The court's weak definition exacerbates the problems with the substantial similarity test and will adversely affect both the dance world and the legal community.[140]

A. Horgan*'s Definition of Choreography*

The Second Circuit missed an important opportunity to clarify and define the meaning of "choreography" under the Act.[141] In its opinion, the court noted that the Act failed to define choreography.[142] The court also noted that the legislative reports to the Act indicate that simple steps and routines do not qualify as choreogra-

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135 *See* Gennerich, *supra* note 47, at 382 (stating that parties reached out-of-court settlement).

136 *See* Weinhardt, *supra* note 6, at 844 (stating that *Horgan* opinion is first to address Copyright Act in relation to choreography).

137 *See infra* notes 161-89 and accompanying text (discussing weaknesses of court's definition of choreography).

138 Movement is a central element of choreography, according to experts in the art of choreography. *See* George Balanchine, *Notes on Choreography, in* The Dance Encyclopedia 201 (Chujo & Manchester eds. 1967); Merce Cunningham, *Two Questions and Five Dances, in* Dance as a Theatre Art, *supra* note 48, at 198, 198-99; Singer, *supra* note 5, at 298, 298 n.48 (citing Letter from Agnes de Mille).

139 *See infra* notes 194-205 and accompanying text (discussing weaknesses of substantial similarity test).

140 *See infra* notes 206-16 and accompanying text (discussing impact of *Horgan* court's opinion on courts and choreographers).

141 *See Horgan*, 789 F.2d at 161. The court did not effectively expand upon the definition provided by the legislative reports. *Id.*

142 *Id.* at 161. The Copyright Act begins with an exhaustive list of definitions but omits one for choreography. *See* 17 U.S.C. § 101 (1988 & Supp. IV 1992). This absence may reflect legislative intent to allow custom to define the word, or may reflect Congress' inability to arrive at a satisfactory

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phy.[143] The court then turned to the Copyright Office's definition of choreography for guidance.[144] The Copyright Office defines choreography as the composition and arrangement of dance movements and patterns, usually accompanied by music.[145] The Copyright Office further indicates that dance is static and kinetic successions of bodily movement in certain rhythmic and spatial relationships.[146] Finally, the Copyright Office recognizes that the individual building blocks of dance are not copyrightable.[147] These building blocks include social dance steps, simple routines, and individual ballet steps.[148] According to the Copyright Office, however, a choreographer may incorporate these simpler movements into an otherwise copyrightable work.[149]

Based on the Copyright Office's statements on choreography, the book's authors asserted that the essence of choreography is the flow

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definition. *See* Traylor, *supra* note 59, at 236 (discussing possible reasons for absence of choreography definition in Copyright Act).

143 *Horgan*, 789 F.2d at 161.

144 *Id.* The Copyright Office issued a statement that defines choreography, lists the characteristics of choreographic works, and describes choreographic content. *Id.* (citing COMPENDIUM II §§ 450.01, 450.03(a), 450.06).

145 *Id.* (citing COMPENDIUM II § 450.01).

146 *Id.*

147 *Id.* (citing COMPENDIUM II § 450.06) (stating that social dance steps, simple routines, and individual steps are not copyrightable); *see also* Wallis, *supra* note 5, at 1454 (stating that copyright does not protect building blocks of choreography).

148 *Horgan*, 789 F.2d at 161 (citing COMPENDIUM II § 450.06) (analogizing writer's words to simple choreographic elements). Balanchine also analogized dance steps to words. *See* Balanchine, *supra* note 48, at 190. He stated that just as words are a writer's equipment, so dance steps are a choreographer's equipment. *Id.*; *see also* Wallis, *supra* note 5, at 1454 (comparing dance steps to short word phrases); JOAN LAWSON, A BALLET MAKER'S HANDBOOK 65-73 (1991) (discussing choreographers' vocabulary and analogizing steps and gestures to verbs and nouns respectively). Gestures, rhythm, timing, phrasing, and pattern are also basic elements that build a choreographic composition. *Id.* at 16, 85-88.

149 *See Horgan*, 789 F.2d at 161 (citing COMPENDIUM II §§ 450.03(a), 450.06). In their pieces, choreographers sometimes arrange traditional dance steps or popular dance forms in new patterns. AGNES DE MILLE, THE BOOK OF THE DANCE 209 (1963). Famed choreographer Agnes de Mille disapproved of the originality requirement, stating that it was not in the province of the law to judge whether a dance, even if trite and commercial, has creative, original value. Singer, *supra* note 5, at 298 n.45 (citing Letter from Agnes de Mille).

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of movement.[150] They argued that photographs that capture static positions cannot possibly capture the underlying flow of movement or choreography.[151] The appellate court erroneously rejected this contention and provided a different analysis, which has several weaknesses.[152]

To define choreography, the appellate court analyzed how photographs can convey movement.[153] The court posited two theories of how photographs capture choreography; both are inadequate and unconvincing.[154] First, the court asserted that a photograph can capture choreography by recording sufficient elements of it, such as shape and spacing, without actually capturing any movement.[155] This Note refers to this theory as the "static-elements theory." The static-elements theory reflects a definition of choreography in which movement and timing are collateral.[156] Under this theory, a work need not portray any movement or timing to infringe a choreographic copyright.[157]

The *Horgan* court's second theory posited that a photograph could capture choreography by conveying not only the split second recorded by the photograph, but also the moments just before and immediately after the recorded moment.[158] The court stated that a photograph could elicit in the imagination of a person who had recently seen a performance the flow of movement immediately preceding and following the split second recorded in the photo-

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150 *Horgan*, 789 F.2d at 161-62. *See generally infra* notes 174-76 and accompanying text (arguing that Copyright Office's definition supports finding that choreography is essentially movement and timing).

151 *Horgan*, 789 F.2d at 161-62.

152 *See generally id.* at 161-63 (analyzing definition of choreography); *infra* notes 161-89 and accompanying text (discussing shortcomings of court's analysis of definition of choreography).

153 *Horgan*, 789 F.2d at 162.

154 *Id.*; *see infra* notes 161-89 and accompanying text (discussing court's theories and theories' inadequacies).

155 *Horgan*, 789 F.2d at 162. The court stated that a photograph that captures one moment of a dance phrase may convey a great deal. *Id.* The photo could capture a gesture, the shapes of dancers' bodies, and the dancers' spacing on the stage. *Id.*

156 If a work can portray choreography by merely portraying shapes and spacing, movement and timing are collateral.

157 *See Horgan*, 789 F.2d at 162 (suggesting that photographs could "freeze" choreographic moments). If a frozen moment may capture choreography, it follows that movement is not essential to depict choreography.

158 *Id.*

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graph.[159] This Note refers to this theory as the "surrounding-moments theory." This theory reflects a view that movement is central to choreography.[160]

The court's first theory, the static-elements theory, has three flaws. First, under this theory, a photograph may portray choreography by showing only gestures, body shapes, or spacing on the stage.[161] However, gestures, shapes, and spacing are merely the building blocks, or vocabulary, of choreography.[162] Therefore, this theory conflicts with the court's recognition that, just as writers cannot copyright words, choreographers cannot copyright the basic building blocks of dance.[163]

The second problem with the static-elements theory is that it fails to indicate what combination of building blocks, or elements, a work must simultaneously portray to constitute infringement of the original choreographic copyright.[164] If a photograph captured a

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159 *Id.* The court discussed a photograph from the dance of the "Sugar Canes," in which the dancers were jumping in the air, hoops over their heads, with one dancer jumping through a hoop, her legs thrust forward and parallel to the ground. *Id.* The court stated that an ordinary observer, who had only recently seen a performance of *The Nutcracker Ballet*, would be able to remember the moments before and after the moment captured in the photograph. *Id.* at 162-63.

160 A person who remembers the flow of a dancer's movement through time necessarily recalls the choreography's movement and timing.

161 *See Horgan*, 789 F.2d at 163.

162 *See* LAWSON, *supra* note 148, at 65-73 (analogizing choreographic elements to writer's vocabulary). *See generally* Wallis, *supra* note 5, at 1454 (discussing how dance steps are vocabulary or building blocks of choreography and are not copyrightable). Balanchine also analogized a choreographer's use of basic materials to a writer's use of words. *See* Balanchine, *supra* note 48, at 187.

163 *See Horgan*, 789 F.2d at 161 (stating that basic materials are not copyrightable). The appellate court stated that the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. *Id.*; *see also* Wallis, *supra* note 5, at 1454 (stating that ballet step, for instance a glissade or jete (glide or jump), is not copyrightable because it is merely building block of choreographic works). However, the court stated that choreographers may use such simple steps as basic material the same way that writers use words as basic material. *Horgan*, 789 F.2d at 161. Experts in the dance field have also analogized the elements of dance to words. *See* LAWSON, *supra* note 148, at 65-73; Balanchine, *supra* note 48, at 187.

164 *Horgan*, 789 F.2d at 161-63. The court indicated that although a simple shape is not enough to infringe, shape, plus the composition of dancers on the stage, may exhibit sufficient choreographic elements to infringe. *Id.*

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dancer center stage, in a basic arabesque position,[165] it would portray spacing as well as shape.[166] Whether the *Horgan* court would find that the photograph copied any choreography is unclear.[167] If a television program showed the same static photograph and played the rhythm of the piece, the program would portray three elements of choreography: shape, spacing, and rhythm. However, the rhythm with a static image does not convey the phrasing of the movement, the timing of the dancers, the motion itself, or the movement pattern on the stage.[168] If on the same program, however, the photograph showed many dancers, all in unusual positions spaced across the stage,[169] more of the piece's originality would emerge.[170] Yet the image would still not convey many important elements of the choreographer's expression, such as timing, pattern, and movement.[171] The court's static-elements theory thus fails to indicate what combination of elements a work must portray to constitute infringement of the copied work.[172]

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165 An arabesque is a classical ballet position in which the dancer stands on one leg and stretches the other one behind her off the floor. SANDRA NOLL HAMMOND, BALLET: BEYOND THE BASICS 53-54 (1982).

166 For example, see the photo of Ashton's "The Dream" in FONTEYN, *supra* note 19, at 310. Stage spacing and shape, which a photo can depict, are two of many elements of a choreographic work. *See generally* LAWSON, *supra* note 148, at 16 (discussing elements of choreography).

167 *See Horgan*, 789 F.2d at 163 (suggesting that some photographs portray more choreography than others).

168 Movement, phrasing, motion, and pattern are all important aspects of a choreographic piece. *See generally* LAWSON, *supra* note 148, at 16 (discussing elements of choreography); *supra* notes 145-47, *infra* notes 222-29, and accompanying text (discussing definitions of choreography that include movement, timing, and pattern).

169 For example, see the photo of Martha Graham and her company in "Primitive Mysteries" in FONTEYN, *supra* note 19, at 112.

170 *See supra* notes 62-69 and accompanying text (discussing requirement of originality under 17 U.S.C. § 102(a) (1988 & Supp. IV 1992)).

171 *See* Singer, *supra* note 5, at 298, 298 n.48 (citing Letter from Agnes de Mille) (stating that choreography is an arrangement in time-space, using human bodies as units of design). Elements of timing, pattern, and movement are all important elements of choreography. *Id.*; *see also* LAWSON, *supra* note 148, at 16, 66-67, 85-88 (discussing elements of choreography); *Horgan*, 789 F.2d at 161 (citing COMPENDIUM II § 450.01) (indicating that choreography is composition of dance movements, static and kinetic, in space and time); *infra* notes 222-29 and accompanying text (presenting other choreographers' definitions of choreography).

172 *See supra* notes 164-71 and accompanying text.

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Finally, the static-elements theory is flawed because it ignores the essential elements of choreography: movement and timing.[173] Even under the limited definitions of choreography that the Copyright Office provided, movement and timing are fundamental.[174] Movement and timing are elements of choreography that integrate the other elements: shape, spacing, floor pattern, rhythm, and phrasing.[175] Therefore, a work that does not portray the actual movement and timing of a choreographic work also does not show these other elements.[176]

The appellate court's surrounding-moments theory is preferable to its static-elements theory because the former recognizes that a photograph can indirectly portray actual movement.[177] However, the surrounding-moments theory is inconsistent with the notion that single chords of music cannot infringe musical compositions.[178] Arguably, a person who has just heard a piece of music that begins with a loud chord followed by softer scales may instantly

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[173] *See Horgan*, 789 F.2d at 162 (positing static-elements theory). Horgan argued that movement is an essential element of choreography. *Id.* at 161-62. Movement and timing are central to definitions of choreography that choreographers and people in related fields provide. *See* Traylor, *supra* note 59, at 237 (suggesting movement and timing are central to many definitions of choreography); *see, e.g.*, DE MILLE, *supra* note 149, at 208 (stating that like music, dance is "time-art" in which theme develops, climaxes, and concludes); *infra* notes 222-29 and accompanying text (discussing choreographers' definitions of choreography).

[174] *See Horgan*, 789 F.2d at 161 (citing COMPENDIUM II § 450.01). The Copyright Office describes choreography as dance movements accompanied by music and as successions of bodily movements in rhythmic relationship. *Id.* The repeated use of the word "movement" to describe choreography indicates that movement is a central characteristic of choreography. *Id.* The definition of dance as movements that are successive and often accompanied by music reveals the fundamental importance of timing in choreography. *Id.*

[175] *See generally* BANES, *supra* note 1, at 16 (stating that timing and meter in dance affect dancers' phrasing and rhythm).

[176] *Id.*

[177] *See* Horgan v. Macmillan, Inc., 789 F.2d 157, 163 (2d Cir. 1986) (stating that viewer of photograph of dancer in air instinctively knows that some movement propelled her there and that gravity will bring her down). The appellate court concluded that a photograph of a dancer in the air indirectly portrayed some movement. *Id.*

[178] *Horgan*, 789 F.2d at 163 (drawing analogy between photographs of frozen choreography and single chords of Beethoven symphony). A composer may not copyright a single chord of music because chords are the building blocks of musical compositions. *See* 17 U.S.C. § 101 (1988 & Supp. IV 1992). The *Horgan* district court stated that just as a document containing every twenty-fifth chord of a symphony could not recreate or infringe a copyright of

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recall that transition if she hears the chord in isolation.[179] Similarly, if a musical composition uses the same chord repetitively,[180] someone who hears that chord after recently hearing the piece may remember the particular section of the composition that repeats the chord.[181] An individual's recall of the notes surrounding the chord, however, would not provide the composer of the piece with grounds for a copyright infringement claim.[182]

Similarly, a photograph that captures a jump may remind someone who had just seen a live performance of the moments before and after the jump.[183] While the *Horgan* appellate court accepted that isolated chords of music could not infringe musical copyrights,[184] it distinguished photographs of choreography.[185] The appellate court stated that photographs could actually portray more choreography than chords could portray music.[186] The court's approach would provide a choreographer with a claim based on an

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the symphony, so photographs could not recreate or infringe a copyright of a work of choreography. *Horgan*, 789 F.2d at 163.

179 The first movement of Beethoven's Piano Concerto no. 5 in E flat, opus 73 (the "Emperor Concerto") is such a piece. It begins dramatically with a distinct chord, followed by softer notes. The distinct chord can act as a cue, triggering the memory of the listener.

180 For example, Chopin's "Funeral March" repeats the same haunting chord over and over again, leaving the listener with a distinct memory of the repetition. Chopin, Piano Sonata no. 2 in B flat minor, opus 35, 3d movement (the "Funeral March").

181 *See generally* Sitzer, Note, *supra* note 126, at 386 (stating that people familiar with certain art forms can remember subtleties in pieces). A person may be particularly likely to recall a musical piece if the person is a member of the audience that the artist intended to reach, a listener with special knowledge, skills, or tastes. *Id.* Some courts and authors have suggested that the audience the artist intended to reach with her work should determine substantial similarity. *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (stating that member of plaintiff's audience should determine substantial similarity); Sitzer, Note, *supra* note 126, at 393 (suggesting that member of audience author intended to reach should determine substantial similarity).

182 *Horgan*, 789 F.2d at 163. Stirring one's memory of a copyrighted work is not sufficient to constitute infringement. Warner Bros. v. American Broadcasting Corp., 720 F.2d 231, 242 (2d Cir. 1983).

183 *Horgan*, 789 F.2d at 163. The appellate court noted that the viewer of a photograph of dancers in the air understands instinctively that the dancers jumped from the floor only a moment earlier and came down shortly after the photographed moment. *Id.*

184 *Id.* The Second Circuit noted the district court's analogy and impliedly agreed that single chords could not infringe musical copyrights. *Id.*

185 *Id.*

186 *Id.*

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observer's recall of the movement surrounding the moment captured in the photograph.[187]

However, chords of music and photographs of choreography are analogous, and it is inconsistent to treat them differently.[188] Like a chord of music, a photograph serves as a mere reminder of the surrounding moments, rather than a clear portrayal of the artist's expression.[189] The photograph does not actually copy any of the remembered movement or timing. Therefore, the surrounding-moments theory, like the static-elements theory, fails to require that a work directly copy movement or timing to infringe a choreographic copyright.

B. Substantial Similarity Test

After analyzing the definition of choreography and how photographs could portray choreography, the appellate court addressed the appropriate copyright infringement test.[190] The appellate court rejected the trial court's approach, which did not consider the substantial similarities between the two works.[191] The trial court had narrowed the question to whether the defendant's work could recreate the plaintiff's work.[192] The appellate court, however, held that the proper test for determining infringement was the one it used in all copyright cases: the substantial similarity test.[193] The substantial similarity test asks whether an ordinary observer who viewed both the plaintiff's original work and the defendant's allegedly infringing work would be disposed to overlook their disparities and perceive their aesthetic appeal as the same.[194] However, the substantial similarity test is difficult to apply to choreographic infringement cases for two reasons.

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187 *See supra* notes 158-60 and accompanying text (discussing court's surrounding-moments theory).

188 *Horgan*, 789 F.2d at 163.

189 A work must do more than provoke the memory of a copyrighted work to infringe. *See* Warner Bros. v. American Broadcasting Corp., 720 F.2d 231, 242 (2d Cir. 1983) (discussing how memory of copyrighted characters does not constitute infringement).

190 *Horgan*, 789 F.2d at 162.

191 *Id.*

192 *Id.* at 158.

193 *Id.* at 162.

194 *Id.* The *Horgan* court adopted the test from an opinion that Judge Learned Hand authored in Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

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First, the substantial similarity test uses an overall aesthetic appeal standard that fails to clearly identify the protected elements of the work.[195] Under the test, an ordinary observer would base her perception on the overall aesthetic appeal of the two works.[196] A dance production, however, often incorporates lighting, music, costumes and sets,[197] all of which qualify for separate copyright protection.[198] Because a dance production integrates art forms that a choreographic copyright does not cover,[199] an ordinary observer may improperly consider these other art forms when determining overall aesthetic appeal.[200] The court's unclear definition of choreography aggravates the difficulties an ordinary observer will have when she tries to distinguish the choreography from other elements of the production. This is because when an ordinary observer makes her overall aesthetic appeal determination, she

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195 *See* Cohen, *supra* note 127, at 739-40 (discussing ordinary observer standard's failure to identify copyrightable elements).

196 *Horgan*, 789 F.2d at 162 (citing Peter Pan Fabrics v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960)).

197 *See* VAN PRAAGH & BRINSON, *supra* note 1, at 3 (stating that dance productions are dependent on allied arts of drama, music, and design); LOIS ELLFELDT & EDWIN CARNES, DANCE PRODUCTION HANDBOOK 40-113 (1971) (discussing elements of dance production). Lighting, music, costumes, and sets can be important aspects of a dance production. *Id.*

198 *See* 17 U.S.C. § 102 (1988 & Supp. IV 1992) (protecting broad range of creative works).

199 *See, e.g., Horgan*, 789 F.2d at 162. In a dance production, a choreographer does not necessarily own the copyrights to the sets, music, or costume design. *Id.* For example, costume designer Karinska and set designer Rouben Ter-Artunian created the costumes and sets for *The Nutcracker Ballet* under separate licensing agreements between themselves and NYCB. *Id.*

200 *See* Cohen, *supra* note 127, at 739-40 (stating that court should not consider uncopyrighted elements in infringement determination). An ordinary observer could, for example, perceive an aesthetic similarity between two pieces based upon their lighting despite different choreography. *See, e.g.*, "Caught," David Parsons (1984) (using strobe lighting effects to capture dancer in air). An ordinary observer may perceive a similar overall aesthetic appeal between "Caught" and another piece that uses similar strobe lighting effects despite different choreography. *Id.*

In *Horgan*, the authors argued that the choreography was visually indistinguishable from the rest of the production. *Horgan*, 789 F.2d at 162. However, the appellate court rejected the authors' contention and instructed the lower court to distinguish, on remand, the copyrighted choreography from the costumes and sets in which the Balanchine estate claimed no right. *Id.* at 163. The *Horgan* court suggested that one method for aiding in this task would be the use of expert testimony. *Id.*

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will not know exactly what constitutes the production's choreography.[201]

The second shortcoming of the substantial similarity test is that it suggests that even small takings can constitute infringement.[202] To infringe under the test, small portions of the defendant's work must be substantially similar to the plaintiff's work.[203] However, no court has been able to provide an objective framework to determine what combination of elements a defendant must copy to infringe the plaintiff's copyright.[204] The appellate court's inadequate definition of choreography exacerbates the deficiencies of the substantial similarity test and will negatively affect choreographers, attorneys, and courts.[205]

C. Impact of Horgan

The appellate court's failure to provide a clear definition of choreography will negatively affect choreographers interested in protecting their work.[206] Attorneys will find it difficult to represent their clients without a clear definition of choreography.[207] Case-by-case analysis may ensue, resulting in courts reaching varying decisions and employing standards that differ from jurisdiction to juris-

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201 *See generally* Traylor, *supra* note 59, at 236 (emphasizing need for clear definition of choreography to protect art form effectively).

202 *Horgan*, 789 F.2d at 162.

203 *Id.*; *see supra* notes 125-29 and accompanying text (stating that small takings can infringe work under court's value approach to substantial similarity test).

204 *See supra* notes 164-72 and accompanying text (discussing court's failure to indicate what combination of elements a choreographer must copy to constitute infringement). Courts should provide an objective framework for deciding how much copying is too much. *See* Cohen, *supra* note 127, at 741-44.

205 Cohen, *supra* note 127, at 741-44.

206 *See infra* notes 207-16 and accompanying text (discussing negative effects of *Horgan*). *But see* Singer, *supra* note 5, at 290 (discussing how many choreographers opt to rely on custom in dance world to protect their works); Traylor, *supra* note 59, at 237 (stating that many choreographers prefer to rely on character of dancers and condemnation by dance community of anyone who misappropriates material rather than record and copyright work legally). Reluctance of choreographers to take advantage of copyright protection could be in part because courts have not clearly stated the legal requirements in this uncharted area of the law. Singer, *supra* note 5, at 290.

207 *See* Weinhardt, supra note 6, at 845 n.62 (stating that unclear definition of choreography will make it difficult for attorneys to represent their clients).

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diction.[208] Without a uniform body of law, choreographers and attorneys will have difficulty defining choreographers' rights and determining when a work infringes a choreographic copyright.[209]

Furthermore, the *Horgan* court's theory that a work need not show any movement to infringe choreography will stifle artists' creativity.[210] Fear of lawsuits will deter artists working in static mediums from using choreography as their subject matter.[211] Although copyright law should deter the exploitative use of choreographers' work,[212] the law should not be so rigid as to stifle the very creativity legislators intended copyright law to foster.[213]

Copyright law that forbids copying the static elements of choreography will not only stifle creativity but will also slow the rate of choreography's growing popularity.[214] Dancers and choreographers benefit from photographs, paintings, articles, and books that focus on dance.[215] These creative mediums, however, generally portray only the static elements of choreography. If a work that portrays no movement can infringe a choreographic copyright,

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208 *Id.* at 845.

209 *Id.*

210 *See infra* notes 211-13 and accompanying text (discussing how court's theory will stifle creativity).

211 Copyright law exists in part to deter people from infringing works. Warner Bros. v. American Broadcasting Corp., 720 F.2d 231, 245 (2d Cir. 1983).

212 Iowa State Univ. Research Found. v. American Broadcasting Co., 621 F.2d 57, 60 (2d Cir. 1980).

213 *Id.*; *see also Warner Bros.*, 720 F.2d at 245 (stating that copyright law should strike balance between protection for authors and freedom for others to create works).

214 *See* BANES, *supra* note 1, at 1 (stating that modern dance is gaining broader audience). Dance has also grown as an educational force. TERRY, *supra* note 53, at 234-35. Many universities offer dance classes through their Physical Education departments, and increasing numbers offer a major in dance. *Id.* at 236-37.

215 *See* DANCE: THE ART OF PRODUCTION, *supra* note 1, at 131-37 (discussing importance of promotion and publicity for dance concerts). Books that contain many photographs of dance and focus on a particular type of dance, or a particular choreographer or company, can promote the art form as a whole. *See, e.g.*, FERNANDO BUJONES, FERNANDO BUJONES (1984); FONTEYN, *supra* note 19 (giving a broad overview of dance). Great artists whose work involved dance include: Degas, a French painter who painted scenes of ballet life at the Paris Opera from the 1860s to 1880s; and Carpeaux, a French sculptor who did "The Dance" for the facade of the Paris Opera. FONTEYN, *supra* note 19, at 22; ANTHONY F. JANSON, THE HISTORY OF ART 612 (Harry N. Abrams ed., 1986).

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fewer artists will use dance as their subject matter, and choreography will receive little public exposure.[216]

IV. An Alternative Analysis

The *Horgan* court's definition of choreography is inadequate and will generate great confusion for future choreographers, litigants, and courts.[217] This Note proposes an alternative analysis for a clearer definition of choreography.[218] The analysis provides a basis for finding that a work must copy movement and timing to infringe a choreographic copyright.[219] A clearer definition of choreography that centers on movement and timing would provide guidance to a trier of fact who is determining infringement.[220] This definition will both clarify choreographers' rights and help jurors apply the substantial similarity test.[221]

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216 Fewer books and photographs depicting dance will lessen the public's exposure to the art form. *See generally* Bujones, *supra* note 215; Fonteyn, *supra* note 19 (exposing public to dance).

217 *See supra* notes 206-16 and accompanying text (discussing impact of *Horgan* decision).

218 A strong, workable definition of choreography is essential for the Act to be of value to artists. Traylor, *supra* note 59, at 238.

219 Choreographers themselves indicate that movement and timing are central to choreography. *See, e.g.*, de Mille, *supra* note 149 (defining choreography as "time-art" in which theme develops, climaxes, and concludes); Cunningham, *supra* note 138.

220 By focusing the trier of fact on movement and timing alone, the trier of fact will be less likely to consider elements of a production that the choreographic copyright does not protect. *See* Van Praagh & Brinson, *supra* note 1 (stating that dance productions often rely on drama, music, and design).

221 *See infra* notes 233-39 and accompanying text (discussing how proposed definition clarifies both choreographers' rights and substantial similarity analysis); Traylor, *supra* note 59, at 237-38 (stating that workable definition of choreography derived from dance world is necessary to implement Act). One problem with a definition of choreography that focuses on movement and timing is that precise movement and exact timing are difficult to fix. *See supra* notes 70-76 and accompanying text (discussing problems with fixation methods). However, the existing means of fixation adequately capture the basic flow of movement. For example, Balanchine fixed his *Nutcracker Ballet* by videotaping a rehearsal. Horgan v. Macmillan, Inc., 789 F.2d 157, 158 (2d Cir. 1986). The video, although unable to capture the movements' subtleties, displays the dancers' basic movement and timing. By displaying the ballet's basic movement and timing, the video also incorporates the ballet's shapes, spacing, stage pattern and rhythm.

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Definitions of choreography from members of the dance community provide insight into the essence of choreography.[222] The prominent modern choreographer Merce Cunningham[223] maintains that the basis for his dance pieces is movement itself.[224] George Balanchine referred to choreography as movement used to produce visual sensations.[225] He further recognized that the important thing in dance is the movement itself.[226] Similarly, Agnes de Mille defined choreography as an arrangement in time-space, using bodies as its units of design.[227] Others who work in the dance field or related fields[228] view choreography as the art of creating dance or patterned movement, based on a time frame, usually defined by music.[229] These definitions emphasize the movement and timing elements of choreography.

If Congress intended to have the dance community define choreography, as some authors have suggested,[230] the definitions provided by experts in the field indicate that choreography is essentially movement and timing. Congress, however, may have left a definition out of the statute because it could not agree on one.[231] In that case, input from members of the dance community, in con-

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222 *See* Traylor, *supra* note 59, at 228 (stating that to seek help in defining choreography from dance community is legitimate approach for courts to pursue). Flexibility in application of the Copyright Act is required if the Copyright Act will give choreography the same amount of protection afforded literary works. *Id.* The customs and usages that have evolved within choreography must inform application of the Copyright Act. *Id.*

223 Merce Cunningham began his career in Martha Graham's company. *See* BANES, *supra* note 1, at 5-6. Cunningham is one of the great contributors to modern dance with his innovative approach to movement and choreography. *Id.* at 6-7. For reviews of his work, see ANDERSON, *supra* note 1, at 128-37.

224 Cunningham, *supra* note 138, at 198, 198-99. Cunningham stated that he starts "with the movement," and that the movement may be movement of something other than the human body. *Id.*

225 Balanchine, *supra* note 138, at 202. Balanchine stated that "if the illusion fails, the ballet fails." *Id.* at 201.

226 *Id.*

227 *See* Singer, *supra* note 5, at 298, 298 n.48 (citing Letter from Agnes de Mille).

228 Professional fields related to dance include design, music, and drama. VAN PRAAGH & BRINSON, *supra* note 1, at 3; *see* LAWSON, *supra* note 148, at 15 (stating that choreographers often collaborate with authors, composers, stage designers, and technicians).

229 Traylor, *supra* note 59, at 237; *see* Wallis, *supra* note 5, at 1455.

230 *See* Traylor, *supra* note 59, at 236 (suggesting possibility that Congress purposefully omitted definition of choreography).

231 *Id.*

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junction with the Copyright Office's descriptions of choreography, should guide courts to include movement and timing as essential elements in the definition of choreography.[232]

Experts have provided definitions of choreography that suggest that an artist must copy both the movement and timing of a piece for a court to find copyright infringement.[233] The proposed definition of choreography makes clear that a choreographic copyright protects only the movement and timing that the choreographer created.[234] Movement and timing can incorporate other elements, or building blocks, of choreography such as shape, rhythm, stage patterns, and phrasing. Under this definition, however, a choreographer could only recover against a person whose work portrayed the choreographer's movement and timing.[235]

Besides clarifying choreographers' rights,[236] the proposed definition would help triers of fact apply the substantial similarity test. One problem with the substantial similarity test is that it fails to provide jurors with guidance needed to distinguish choreography from the rest of a dance production.[237] However, under the proposed definition, a trier of fact would focus solely on the movement and timing of each work.[238] Therefore, the proposed definition of choreography would help jurors distinguish the choreography from

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232 *See supra* notes 145-47, 150-52, 222-29 and accompanying text (discussing definition of choreography from Copyright Office and prominent members of dance community).

233 Definitions of art forms generally correlate to the elements a copyright protects. *See* 17 U.S.C. § 101 (1988 & Supp. IV 1992) (setting forth definitions). Thus, if choreography is essentially movement and timing, a work can only infringe another work if it copies those protected elements.

234 *See generally* COMPENDIUM II § 450.01 (indicating that choreography is composition of dance movements, static and kinetic, in space and time). A copyright only protects the copyrightable elements of a work. *Id.* Thus, if movement and timing are essential to a choreographer's copyright, an infringer would have to copy those protected elements. *Id.*

235 *Id.*

236 *See* Wallis, *supra* note 5, at 1453 (stating that lack of specific definition leads to uncertainty as to whether Act protects work). A specific definition would clarify choreographers' rights and avoid litigation over the issue. *Id.*

237 *See* Cohen, *supra* note 127, at 739-40 (discussing difficulty of identifying protected elements of work under substantial similarity test).

238 *See infra* notes 241-42 and accompanying text (stating that choreographer would need to show that defendant's work copied choreographer's movement and timing in order to establish infringement).

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other elements of a production by clarifying that choreography is essentially the movement and timing of the dancers.[239]

The proposed definition would also help define how much copying constitutes infringement. The substantial similarity test fails to provide an objective framework for deciding this issue.[240] Although this Note does not provide such an objective framework, the proposed definition does clarify that a work must portray more than mere static elements, such as shaping and space, to infringe a choreographic copyright.[241] Therefore, if the *Horgan* court had used the proposed definition of choreography, it would not have found infringement because photographs, by their very nature, portray only the static elements of choreography.[242]

In addition to clarifying infringement analysis, a definition of choreography that centers on movement and timing serves policy concerns. For example, the proposed definition of choreography would deter exploitative uses while allowing beneficial uses by artists in other fields.[243] Under the proposed definition of choreography, artists working in other mediums, especially static mediums such as photography and painting, could use dance as their subject matter without fear of infringement suits. The proposed definition offers less protection to some choreographers than the *Horgan* court's approach because it does not protect the static elements of choreography. The freedom to use depictions of dance as subject matter, however, will stimulate creativity in artists for whom dance

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239 Triers of fact may not consider elements of a work or production that the copyright does not protect. *See* Wallis, *supra* note 5, at 1452-55 (discussing Act's exclusion of simple dance steps from protection). Therefore, if a choreographic copyright protects only movement and timing, triers of fact would know not to consider lighting, shape and spacing, and other unprotected elements of a production.

240 *See* Cohen, *supra* note 127, at 741-44.

241 *See supra* notes 233-35 and accompanying text (discussing how under proposed definition of choreography defendant must copy movement and timing in order to infringe plaintiff's work).

242 *See* Horgan v. Macmillan, Inc., 789 F.2d 157, 162-63 (2d Cir. 1986) (stating that photographs capture frozen moments in time).

243 *See generally* Iowa State Univ. Research Found. v. American Broadcasting Co., 621 F.2d 57, 60 (stating that copyright law should allow fair use but deter exploitative use of works).

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is an inspiration.[244] The use of dance in other artistic mediums will in turn broaden choreography's appeal and promote the art.[245]

CONCLUSION

The Copyright Act of 1976 launched a new era for choreography and copyright. The Second Circuit had the first opportunity to explore and apply existing law to this unique form of expression. In its analysis, however, the court did not utilize a definition of choreography that sufficiently emphasized movement and timing.

Had the court sought help from the dance community to define choreography, the court would have found valuable guidance from experts in the field. Movement and timing are at the core of all definitions of choreography that emerge from choreography experts. A definition centering on movement and timing would clarify choreographers' rights by making clear that a choreographic copyright only protects a choreographer's movement and timing. Furthermore, a clear definition based on movement and timing would aid courts and jurors in applying the substantial similarity test to choreographic copyright infringement cases.

The definition of choreography proposed in this Note would help alleviate jury confusion by focusing the jury on the crucial elements of choreography. Furthermore, the proposed definition would provide courts with some guidance in determining how much copying constitutes infringement. Finally, the proposed definition of choreography would further the Copyright Act's goal of fostering creativity by allowing artists to lawfully copy the static elements of choreography, such as shape and spacing. Under the proposed definition, artists in other fields would feel free to use dance as their subject matter without fear of infringement suits. The lawful use of choreography by artists in other fields would in turn help promote the art of choreography.

Adaline J. Hilgard

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244 Traylor, *supra* note 59, at 238 (stating that dance inspires many kinds of artists who use dance as subject matter); *see, e.g.*, BUJONES, *supra* note 215; FONTEYN, *supra* note 19 (giving a broad overview of dance).

245 *See* DANCE: THE ART OF PRODUCTION, *supra* note 1, at 131-37 (suggesting ways to promote choreography). Artists who have contributed to the popularity of dance include photographers, painters, and writers. *Id.*

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