Business Model: Collaboration and Copyright

This Position Brief is intended for dance artists

The **Invisible Difference: Dance, Disability and Law** project is an Arts and Humanities Research Council-funded project that is exploring issues confronted by professional disabled choreographers and ownership and authorship of their work.

Project Overview

Running from January 2013 to December 2015, ours is an interdisciplinary partnership between academics in Higher Education and artists working in the creative industry. Members of the project are: Professor Sarah Whatley, Coventry University; Professor Charlotte Waelde, University of Exeter; Dr Abbe Brown, University of Aberdeen; Dr Shawn Harmon, University of Edinburgh; Dr Karen Wood and Hannah Donaldson, research assistants; Mathilde Pavis and Kate Marsh, Doctoral candidates and dance artist Caroline Bowditch. During the course of our research we are conducting qualitative research with disabled choreographers and dancers, including Caroline Bowditch, Claire Cunningham , Marc Brew, Chisato Minamimura, and others. We also have strong links with Candoco dance company and other independent disabled dancers.

Our fieldwork has revealed that the practice of disability dance is highly collaborative.[1]It is thus essential for dance artists to understand the legal framework surrounding collaborative works and what their rights in such situations.

Obtaining joint authorship

According to the rules applicable to authorship in the United Kingdom, copyright rewards the artist who expends relevant creative intellectual input in the work such that she produces an original expression of ideas fixed in a tangible manner.[2] With respect to choreographic works, copyright law regards new combinations of choreographic steps as the element eligible for copyright protection, provided that the moves are capable of being distinguished from traditional routines such as ball room dancing.[3] As a consequence, dance artists involved in a collaborative production must contribute to the design of dance phrases to be considered as legal co-authors of the piece. In practice, the author's identity will be evidenced by her control of the creative choices made during the dance making process. In other words, who controls the creative process, owns the work. If such control was shared, the legal authorship would likely to be divided between the relevant artists.

Providing ideas[4], sources of inspiration, documentary sources[5] or light editing[6] of the dance does not amount to joint-authorship.[7] Consequently, collaborating at an abstract level by exchanging ideas is not regarded as co-creation in law.

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[1] M. Pavis and K. Wood, 'Creative industries and Copyright: Research into collaborative practices in dance' <in press 2015>

[2] These conditions are the result of the dispositions of the CDPA 1988 (Sections 1 to 8) interpreted in light of the jurisprudence of the European Court of Justice on the matter. See the Infopaq decision: Infopaq International A/S v Danske Dagblades Forening (Infopaq) (C-5/08) [2009] E.C.R. I-6569. See E. Rosati, Originality In EU Copyright - Full Harmonisation through Case Law. (Edward Elgar 2013)

[3] J. M. Lakes, "A Pas de Deux for Choreography and Copyright" (2005).80 New York University Law Review 1829, 1843.

[4] Kenrick & Co v. Lawrence & Co. (1890) 25 Q.B.D. 835

[5] Springfield v Thame (1903) 19 TLR 650

[6] For instance, underlining errors to correct in a work does not amount to joint authorship, see Fylde Microsystems Ltd v Key Radio Systems Ltd [1998] F.S.R. 449

[7] Millar v Taylor (1769) 98 ER 201; Donaldson v Beckett (1774) HL 1 ER 837. This principle is called the "idea/expression dichotomy" in the legal literature. M. S. Green (2003) "Copyright Facts" 78 Ind. L.J. 919, 949.

Our fieldwork has demonstrated that choreographers working with differently abled dancers are likely to rely on a 'task-responsive' method to choreograph their work.[8] This method consists in having the choreographer design tasks for her dancers to respond to and through which to offer a series of movements. From the dancers suggestions driven by the tasks, the choreographer edits and arranges the steps to compose a coherent whole. The work is then rehearsed by the dancers as directed by the choreographer. In this context, dancers have an obvious creative input in the collaborative dance. However, their contribution may still fall outside of the scope of joint authorship if the choreographer substantially rearranges the sequences proposed by the performers. As she edits the choreographic phrases, the latter are broken down to smaller segments, sometimes individual steps. When the dancers' expression is reduced to such small units, their input in the work loses its eligibility to legal protection.[9] Indeed individual steps are not protectable by copyright[10] because they are assimilated to ideas and are seen as the 'building blocks' of future choreographic works.[11] However, if the choreographer was to insert long segments of the dancers' suggestions in their piece, they would be obliged to share its copyright, notwithstanding that such input was originally triggered by their own input.

It is important to note that artists do not need to have intended to produce a piece in collaboration and work as co-authors for joint authorship to be awarded under UK law.[12] Other jurisdictions such as the United States differ on this point.[13]

There does not have to be equal contribution by each co-author. The contribution of the authors may be unequal and still be protected by equal joint authors' rights. To grant joint authorship, a judge will assess the contribution of the artists both quantitatively and qualitatively so much so that one party may contribute to a small part of the work and yet be put an equal authorship footing with her collaborator so long the input embodies a relevant share of the work's originality.[14] If the collaborators' contributions to the work's originality are judged unequal, the Courts may award a share of the copyright to each joint-author proportionally to their input.[15]

Managing joint authorship

The attribution of joint authorship may have a considerable impact on the management of the work. As joint authors, collaborators become the owners in common[16] of the work.[17] The various rights granted by

[8] Mathilde Pavis and Karen Wood, 'Creative industries and Copyright: Research into collaborative practices in dance' < in press 2015>
[9] Ibid. See comments made above.
[10] J. M. Lakes "A Pas de Deux for Choreography and Copyright" (2005) 80 New York University Law Review 1829, 1845.
[11] L. E. Wallis "The Different Art: Choreography and Copyright" (1986) 33 UCLA L. Rev 1442, 1454.
[12] This situation varies from one jurisdiction to another; dance artists involved in international collaboration should make seek information as to the law applicable to the copyright of the piece they participate in.
[13] US Copyright Act, par. 101
[14] Bamgboye v Reed [2004] EMLR 5
[15] In Fisher v. Brooker, the author of the solo organ which composed 40% of the song received 40% of its copyright. Fisher v. Brooker & Onward Music Ltd [2006] EWHC 3239 (Ch); [2007] EMLR 256
[16] It was held that copyright could be other owned jointly or in common (see cases below) but that the common property is the most usual form of ownership in the context of authors' rights. See David Marchese, "Joint Ownership of Intellectual Property" (1999) 21 European Intellectual Property Law Review 364, 364–5; Waelde C. and others, Contemporary Intellectual Property (3rd edn, Oxford University Press 2013)
Lauri v. Renad [1892] 3 Ch. 402 ; Redwood Music Ltd v Feldman & Co [1979] RPC 1 ; Mail Newspaper plc v Express Newspapers plc [1987] FSR 90
[17] Except where produced during the course of employment: the employer becomes the first owner. CDPA 1988, s. 11

copyright[18] must thus be exercised jointly so much so the consent of all joint authors is necessary prior to any use of the work[19], whether such use would prove beneficial for all the parties involved or not.[20] This situation may be impractical with regard to the day-to-day management of the work once produced. Production or commission contracts will often be used to avoid the situation by including clauses transferring the rights to one person (usually the producer or commissioner). In the absence of contractual arrangements, these rules remain the default options set out in the legislation and relevant whenever collaborators have not arranged otherwise to better suit their interests and practice.

The duration of authorship expires seventy years after the death of the last joint author.

Conclusion

The law recognises co-creation resulting in co-authorship as only a small part of the spectrum of possibilities resulting from dance practice. The collaboration must be on the creative expression of ideas which in the context of dance corresponds to the collaboration in choreographing sequences of the dance. As a consequence, there might be a gap between the rights the law provides and what artists expect to be entitled to. To bridge this gap which, in the event of a dispute, could prove detrimental to productive and longstanding working relationships, dance artists are encouraged to discuss copyright matters in their work and to reach an agreement with their co-collaborators (in writing)[21] before the start of their collaboration.

Recommendations

1. Dance artists should understand what it means to be the author/co-author and owner/co-owner of copyright in a dance.
2. Dance artists should engage with the management of copyright with a view of avoiding potential disputes in the apportionment of copyright in collaborative dance pieces.
3. Dance artists should agree (in writing) on the apportionment and management of joint rights.
4. Dance artists engaging in international collaboration should seek information as to the rules and law applicable to the production they take part in, since copyright law may vary from one jurisdiction to another on the attribution and administration of joint authorship.

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[18] The uses of the work covered by copyright are: copying the work (Section 17), issuing copies of the work to the public (Section 18), renting or lending the work to the public (Section 18A), performing, showing or playing the work in public (Section 19), communicating the work to the public (section 20), making an adaptation of the work or do any of the above in relation to an adaptation. CDPA 1988.

[19] Cescinsky v. George Routledge & Sons, Ltd [1916] 2 K.B. 325 ; Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd [1995] FSR 836

[20] Powell v. Head 91879) 12 Ch D 686 ; Mail Newspaper v. Express Newspaper [1987] FSR 90. (in the context of licensing rights). Section 173(2) CDPA 1988 specifies that this rule is also applicable where the copyright of the work is own jointly (as opposed to in common). One exception is however tolerated in the context of infringement procedures. Suing for breach of copyright is the one right,a joint author may exercise individually and on the behalf of their collaborators. Waterlow publishers v Rose, The Times, 8 December 1989 (CA)

[21] Writing is not necessary but is an excellent means of remembering what has been agreed and of proof of that agreement.