Arts & Humanities Research Council

UNIVERSITY OF EXETER

InVisible DIFFERENCE
DANCE – DISABILITY – LAW

Position Brief for Dancers. Policy Brief: Asserting Copyright

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.

This paper explores the contribution of copyright laws to the development and funding of disabled dance artists. Are disabled dance artists the authors and owners of the copyright in a dance? Could the resulting rights be a source of revenue?

This paper suggests disabled dance artists can find the key to a better (commercial) dissemination of their work through the proper identification and assertion of copyright, whether their practice is located in the artistic mainstream or not.

This brief describes the legal requirements for copyright authorship and ownership, and how it can be used to help to drive artistic practices toward sustainable business models as recommended by the Arts Council[1].

Why copyright?

The government is withdrawing funding from the arts and encouraging artists to consider commercial exploitation of their works as one alternative.[2] Copyright laws are specifically designed to manage and regulate the use by others of one's creative work, including use for commercial purposes.[3]

In this context, legal authorship and ownership of the dance is relevant on two counts. First, copyright management is one of the entrepreneurial skills the Arts Council is advocating as a way forward for the artist to sustain her art. Second, exploitation of copyright can provide a source of income. Royalties could be earned when the work is disseminated through a variety of media including on the television and the Internet. With the creative ways in which works can now be exploited, such as royalties earned when YouTube videos are viewed, the possibilities for diversification of income streams based on copyright are many.

[1] Waelde, Charlotte ; Whatley, Sarah ; Pavis M, "Let's Dance! But Who Owns It?" (2014) 36 European Intellectual Property Law Review 217

[2] *Ibid* 218 : "In 2010–2011 public grant in aid funding to the Arts Council stood at £450 million. In 2011–2012 it as reduced by 14 per cent to £388 million; in 2012–2013 by 7.5 per cent to £359 million; in 2013–2014 by 3 per cent to £348 million; and in 2014–2015 it will be reduced to £343 million"

[3] See Chapter II Sections 16 to 27 Copyright Designs and Patents Act 1988

In addition to economic prerogatives, copyright authorship also grants artists a moral control over their work. Moral rights allow them to ensure that the integrity of their pieces is respected, and that they are identified as the author of the dance.[4]

Who is the author of the Dance?

Dance artists must comply with three conditions to be recognised as legal author of a choreographic piece. First, the work must fit in one of the categories of protectable works (categorisation requirement).[5] Second, the work has to be fixed in writing or otherwise (fixation requirement).[6] Third, the eligible work must be original (originality requirement).

In the context of dance works, the categorisation requirement is easily satisfied. Choreographic works are listed in the legislation as protectable dramatic works and are, as such, eligible for legal protection.[7]

Similarly, dance artists will have little issue complying with the originality condition. What the law means by 'originality' has nothing to do with 'novelty'. For a work to be considered as 'original' it has not to be the copy or the mere trivial derivation of a protected work.[8] This is a low level of originality that may be changing through the influence of European law to a slightly higher standard. Nonetheless, the works created by dancers with disabilities will have no difficulty in meeting this definition. It should be noted here that dance steps as such will not be protectable; neither will well known dances such as ballroom dancing and the Tango. What is protectable is the combination of steps in new ways.

Finally, the choreographic work has to fulfil the fixation requirement. To be protected the dance must be fixed, such as via notation or through video recording. The 'fixed' version will be considered by many to be an incomplete account of the work, but the fixation requirement exists to serve a legal purpose rather than to give a true, artistic, account of the work.

It is our contention that a disabled dance artist who interprets the work of a choreographer will expend sufficient originality in the work to be considered an author of the copyright in the arrangement of the dance on her body, while the choreographer will be considered to be the author of the copyright in the choreography.

Because copyright law focuses on the work, and not on the personal attributes of the author, it makes no difference if the dancer is disabled or not.

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[4] See Chapter IV Sections 77 to 89 Copyright Designs and Patents Act 1988

[5] Section 1 Copyright Designs and Patents Act 1988. Although this requirement has been loosened in 2011 by the European Court of Justice in its *BSA case* (Case C-393/09), a recent case *Taylor v. Macguire* paper-cutting work insisted on qualifying the work at stake when considering its eligibility to copyright protection. See Taylor v. Macguire [2013] EWHC 3804 (IPEC).

[6] Section 3(2) Copyright Designs and Patents Act 1988

[7] Copyright Act 1911 s.35(1): "'Dramatic work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character." Now under Section 3 (1) (d) Copyright Designs and Patents Act 1988: "dramatic work" includes a work of dance or mime". Waelde, Whatley and Pavis (2014) 223 *supra* note 1

[8] Of a protected work or work whose protection has expired

Who owns the copyright in the dance?

Our legislation states that the author of the copyright in a work is the author. That is unless the work has been created by an employee during employment, or if there is an agreement that a third party should own the copyright. In a dance performed by a dancer with disabilities and choreographed by a choreographer there will therefore be two copyrights: one in the choreography – or composition – belonging to the choreographer; and one in the interpretation – or arrangement – belonging to the dancer with disabilities.

Conclusion

Dance artists should be made aware of their rights and what it means to be a legal author and owner of the copyright in the dance.

Recommendations

1. Dance artists should understand what it means to be the author and owner of copyright in a dance.
2. Dance artists should engage with the management of copyright with a view to securing potential income streams
3. Dance artists should ensure that their work is fixed (video record for instance) to ensure the subsistence of copyright.

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