University of Cincinnati Law Review

Volume 88 | Issue 2 Article 9

January 2020

Milly Rocking Through Copyright Law: Why the Law Should Expand to Recognize Dance Moves as a Protected Category

Elijah Hack
University of Cincinnati, hackeh@mail.uc.edu

MILLY ROCKING THROUGH COPYRIGHT LAW: WHY THE LAW SHOULD EXPAND TO RECOGNIZE DANCE MOVES AS A PROTECTED CATEGORY

Elijah Hack

I. INTRODUCTION

Picture yourself at a friend's wedding reception. As you finish your dinner, and nervously make your way to the dance floor, a mob of young children rush past you, each performing the same dance move consisting of swiping their arms rhythmically from side to side. "Fortnite!" the children scream, as confused adults look on.[1]

What you have just experienced has become commonplace in the last few months due to the monumental rise of the behemoth free-to-play video game Fortnite. Created by Epic Games, Fortnite has burst onto the pop culture scene, empowering youths with a litany of ridiculous dances based off in game "emotes." In this case, the kids are performing what they know as "Swipe It," a popular emote from Fortnite's Season 5.

However, a closer examination of the dance shows that the move was not the product of Epic Games focus groups or video game design ingenuity. Instead, the creator of the dance was 2 Milly, a New York rapper, who dubbed the dance the "Milly Rock" when he debuted it along with his rap single with the same title. Fortnite realized the potential of the move in a children's video game and used the move without 2 Milly's knowledge or consent. In response, 2 Milly has filed a lawsuit for copyright infringement against the creator of Fortnite, Epic Games. The basis of the suit will be discussed in this article.

Unfortunately, the appropriation of hip-hop culture, and particularly dance, is not uncommon. Many artists have had their work used by others without consent or credit, and as copyright law currently stands, these artists have little leverage in terms of legal solutions.

The remainder of this Article will proceed in the following order. Part II of this Article will explore the history of copyright law, and how that history has influenced the current state of the law in respect to choreography or dance moves. Part III will then look at the fair use defense, and the merits of 2 Milly's lawsuit. Part IV will then argue that the existing categorical limitations on the copyright of dance moves have created a space where artists are unable to legally protect their creations. The failures of the current system of copyright law leave us a space where

1. Anecdote from Yussef Cole, "Fortnite's Appropriation Issue Isn't About Copyright Law, It's About Ethics," VICE, (Feb. 11, 2019), https://waypoint.vice.com/en_us/article/a3bkgj/fortnite-fortnight-black-appropriation-dance-emote [https://perma.cc/2G6J-ZHYZ].

appropriation is encouraged, and the fundamental rationale of copyright law—the public benefit principle—is ignored. Finally, this Article concludes by calling for a change in copyright law surrounding the area of dance.

II. BACKGROUND

This section will trace the history of copyright law in the United States, noting the reluctance to include dance as a protected category. First, this section examines the foundation of early copyright law as a response to the English tradition of licensing. Second, this section explores the reluctance to include choreography as material that can be protected by copyright and how some choreographers protected their work as a "dramatic composition." Third, this section looks at the inclusion of choreography as a copyrightable category in 1976, the requirements for registration, and why choreographers still face difficulties in infringement litigation. Fourth, this section summarizes the "fair use" doctrine as a defense to copyright infringement. Fifth, this section examines the 2 Milly-Fortnite litigation as an example of the problems surrounding the lack of protection for dance moves as a copyrightable category.

A. History of Early Copyright

The primary purpose of copyright law has always been to benefit the public.[2] Modern American copyright law can trace its origins to the Statute of Anne, passed in England in 1710.[3] In 1557, to combat revolutionary ideas of the Reformation, the English monarchy granted exclusive rights over printing and distributing written works to the Stationer's Company.[4] The monopoly held by the Stationer's Company gave it creative control over the written works of all writers.[5] The Statute of Anne introduced the concept of authorship to the modern world, and no longer made writers beholden to the Stationer's Company.[6] By providing writers, and not the publishers, the right to own and make decisions with their work, the British Parliament believed they could

2. DAVID MIRCHIN, A PRACTICAL GUIDE TO COPYRIGHT LAW IN THE DIGITAL AGE (MCLE) § 7 (2002).

3. *See* Katie Benton, Comment, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 64 (2008) (citing Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS IN INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. OF LAW 4, 4-10 (1999)).

4. Benton, *supra* note 3, at 59.

5. *See Id.*

6. *Id.* at 64.

provide for the "encouragement of learned men to compose and write useful books."[7]

This rationale carried into the American colonies and was the primary motivation behind what has been called the Patent and Copyright Clause, Article 1, §8, Clause 8, of the Constitution: "[The Congress shall have power] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[8] By providing protection, albeit limited protection, to an author's work, the framers believed that they would promote progress and prosperity for all citizens.[9] The right to own one's work, the framers believed, would motivate individuals to continue to push the bounds of science, art, and literature, in turn benefitting the users and admirers of the work: the general public.[10] By explicitly making such protection limited, however, copyright allows the public to build on existing works and arts.[11] The Constitution creates a balance and tension between the rights of creators and artists, and the rights of the public to use and build upon those creations and art.[12]

This theme led to the first copyright protections with the Copyright Act of 1790 passed by the first Congress.[13] The 1790 Act provided that "the author or authors of any map, chart, book or books already printed within the United States . . . shall have the sole right and liberty of printing, reprinting, publishing, and vending . . . for fourteen years from the recording the title thereof in the clerk's office . . . ."[14] The Act allowed for damages to be collected from anyone that printed these works without the permission of the author.[15] Copyright protection was a driver of innovation and creativity in the early years of the United States and continues to be one to this day. However, the reluctance of Congress to update the Act in accordance with modern times to include certain forms of media, and their reason behind such exclusion, highlights the tensions at play with the public benefit rationale.[16]

7. *Id.*
8. U.S. CONST. art. I, § 8, cl. 8.
9. *See Id.*
10. MIRCHIN, *supra* note 2, § 7.
11. *Id.*
12. *Id.*
13. Copyright Act of 1790, ch. 15, 1 Stat. 124.
14. *Id.*
15. *See Id.*
16. *See* Kara Krakower, *Finding the Barre: Fitting the Untried Territory of Choreography Claims into Existing Copyright Law*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 671 (2018).

B. Congress's Reluctance to Include Choreography in Copyright

The Act of 1790 expressly limited the categories of work deemed copyrightable. "Map, chart, book, or books" were the only listed categories of material protected by copyright in the first Act of 1790, and Congress has been hesitant to extend protection to more categories of work.[17] "Choreographic works" were first deemed a form of copyrightable material in 1976, nearly 200 years after the introduction of the federal copyright.[18] The reluctance to include choreography can be traced to the public benefit rationale as well as a general lack of understanding and Congressional confusion surrounding the art form.[19] For most of the nineteenth and twentieth centuries, Congress did not believe that choreography provided any sort of public benefit.[20] During this time, classical ballet had begun to amount a decent following of American fans, based on the well-attended tours of European troupes, but the United States did not have its own well-established tradition of ballet or any other organized dance.[21] Congress felt no need to protect ballet or other choreography with copyright laws primarily because it believed that American society did not value choreography in the same way as written works.[22]

Under the 1909 and 1947 Copyright Acts, some dances were registered, but as "dramatic composition," not choreography.[23] In fact, abstract choreography was not able to achieve copyright protection under the same category because of the lack of a central plot or storyline.[24] Instead of copyright protection, most choreographers in that period, abstract or traditional, relied on community trade customs and contract law to shield their work, preferring to enter into stringent licensing agreements with parties interested in recreating their work.[25]

In the second half of the twentieth century, however, dance began to increase in popularity in the United States.[26] The "dance boom" of the 1960-1970s changed the perception of dance in America.[27] During this boom, civic ballet companies in the United States created a network for

17. Copyright Act of 1790, ch. 15, 1 Stat. 124.

18. Krakower, *supra* note 16, at 676.

19. Benton, *supra* note 3, at 69.

20. *Id.* at 68.

21. *Id.*

22. *Id.* at 69.

23. Barbara 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, 298.

24. Benton, *supra* note 3, at 69.

25. *Id.* at 71.

26. *Id.* at 77.

27. GAYLE KASSING, HISTORY OF DANCE: AN INTERACTIVE ARTS APPROACH, 234 (2007).

the expansion of professional ballet in America[28] and the expansion of disco and other popular dance forms into the American music scene created a newfound appreciation for social dance.[29] Videotape recordings of popular productions from the 1960s and 1970s brought dance into the American classroom, leading to a generation that appreciated dance as a popular art form.[30]

C. The Introduction of "Choreographic Works" in the 1976 Copyright Act

The rise of popular dance and choreography led to the inclusion of a new category of "pantomimes and choreographic works" in the 1976 Copyright Act.[31] The Act required that copyrightable choreography qualified as an original, choreographic work in a fixed tangible medium.[32] This new category allowed for the protection of plotless, abstract choreography rather than attempting to fit choreography into the existing category of dramatic musical compositions.[33] While choreographic works are not defined in the 1976 Act, the legislative history surrounding the Act shows that the drafters meant to exclude "social dance steps" and "simple routines" from the protections of this amendment to the Act.[34] Following Congress' lead, the United States Copyright Office has traditionally excluded social dances from copyright protection under the rationale that copyrightable works are meant to be performed by skilled performers while social dances are meant to be performed by members of the public for their own enjoyment.[35] Even if they contain a substantial amount of creative expression, social dance moves have not been recognized as copyrightable as separate and distinct works of ownership under the Act.[36]

Additionally, the Copyright office has excluded "athletic movements," and "routines not performed by Humans," from the scope of choreographic works.[37] Dance routines to be performed by animals, machines or other inanimate objects have also been deemed non-

28. *Id.*

29. *Id.*

30. *Id.*

31. 17 U.S.C. § 102(a)(4).

32. *See* Singer, *supra* note 23, at 298-301.

33. *Id.* at 298.

34. U.S. COPYRIGHT OFFICE, CIRCULAR 52, COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME 3 (2017) [hereinafter CIRCULAR 52].

35. *Id.*

36. *Id.*

37. *Id.* at 4.

choreographic works under the scope of the Act.[38] By limiting the scope to an arbitrary level of difficulty, the category seems rooted in the aforementioned public benefit rationale.[39] Under this unclear definition, courts have become the judge of the civic and moral worth of choreography.[40]

In order to obtain copyright protection under the 1976 Act, the choreography must be deemed an "original work."[41] Originality may have its own understanding in the artistic community, but under copyright law, the term means that the work has its origin in the skill, labor, or judgement of the creator.[42] While it is unclear what level of originality is required for choreographic works to be copyrightable, scholars believe copyright analysis of the originality of musical compositions provides at least a baseline level of guidance.[43] For music to be deemed an original work, courts look to the manner in which rhythm, harmony, and melody are combined.[44] While a musical composition may have its inspiration in other work, if the composer injects something new into the elements of a composition, the resulting piece will be copyrightable.[45] Similarly, one could assume that while choreography may have inspiration in earlier works or moves, a choreographer's original combination of rhythm, space, and movement would qualify the work as original.[46]

The Act also requires that choreographic works must be fixed in a tangible medium in order to receive the benefit of copyright protection.[47] Primarily, two methods are available to choreographers attempting to obtain a copyright for their work—notation and audiovisual recording.[48] Notation is quite expensive, and many choreographers believe it does not properly capture the nuances of individual interpretation and subtle style.[49] Also, because notation requires a specific skillset and is difficult to master, few pupils are able to read or understand choreographic notation, making reproduction difficult.[50] Likewise, while recording a work may be more accessible and cheaper, a recorded piece does not allow for a choreographer to understand and dissect individual

38. *Id.*
39. *See* Singer, *supra* note 23, at 298.
40. *Id.* at 299.
41. *Id.* at 300.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 300-01.
47. CIRCULAR 52, *supra* note 34, at 2.
48. Singer, *supra* note 23, at 301.
49. *Id.* at 302.
50. *Id.*

movements, nor does the two-dimensional recording properly relay the three-dimensional nature of dance.[51]

While the inclusion of choreographic works in the 1976 Copyright Act granted legal protection not previously available to choreographers and therefore was a step in the right direction, the lack of understanding and difficulty of classifying choreographic works has led to issues. Seeing that Congress enacted these amendments without fully understanding the field, it is easy to foresee how judges and choreographers would also have difficulty in categorizing choreographic works, assessing their originality, and understanding their status as "fixed" work.

When analyzing the question of infringement of a copyrighted choreography, courts have been reluctant to hold that reproduction of the choreography is the only way to represent copyright infringement.[52] In *Horgan v. Macmillan, Inc.*, the Second Circuit concluded that pictures of a copyrighted choreographic work could represent copyright infringement if they were "substantially similar" to the original work.[53] In *Horgan,* the estate of George Balanchine, choreographer of his own version of *The Nutcracker,* sued the publishers of a book which consisted of sixty in color photographs of the performance of Balachine's choreography for copyright infringement.[54] At the lower level, the District Court denied a motion for a preliminary injunction in favor of Balachine's estate holding that "the photographs catch only 'dancers in various attitudes at specific instants of time,' rather than 'the flow of the steps in a ballet,' and thus 'the staged performance could not be recreated' from the photographs."[55] The Appellate Court reversed, holding that the District Court used the wrong standard in assessing copyright infringement.[56] While the Court recognized that it was a case of first impression, it held that the "standard for determining copyright infringement is not whether the original could be recreated from the allegedly infringing copy, but whether the latter is 'substantially similar' to the former."[57] The *Horgan* Court cited a test created by Judge Learned Hand in an earlier case: 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."[58] The Second Circuit's emphasis was not on the medium of the infringing piece, but instead on what affect that

51. *Id.* at 303.

52. *See* Horgan v. Macmillan, Inc., 789 F.2d 157 (2nd Cir. 1986).

53. *Id.* at 162.

54. *Id.* at 158-60.

55. *Id.* at 162 (quoting Horgan v. MacMillan, Inc., 621 F. Supp. 1169, 1170 (S.D.N.Y. 1985)).

56. *Id.*

57. *Id.* (quoting Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090, 1092-93 (2d Cir. 1977)).

58. *Id.* (quoting Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).

infringement would have on the viewer.[59]

D. Fair Use

Not all use of copyrighted material constitutes an infringement.[60] Since the inception of copyright, courts have recognized that there may be fair use of a copyright work.[61] This concept has been coined "the fair use doctrine" and essentially acts a defense to a claim of copyright infringement where an alleged infringer claims that the his unauthorized use of another's copyrighted work did not actually violate the author's rights.[62] The 1976 Copyright Act provides in §107 that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship, or research is not an infringement of copyright."[63] In determining whether a use is fair, the totality of the circumstances must be judged, but the Act provides that the following factors be given specific consideration: "the purpose and character of the use . . .; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work."[64]

In *Campbell v. Acuff-Rose Music, Inc.,* the Supreme Court held that 2 Live Crew's song "Pretty Woman" constituted a fair use of Roy Orbison's copyrighted song, "Oh Pretty Woman."[65] The *Campbell* Court held that 2 Live Crew's parody of Orbison's song was fair use of Orbison's song as a comment on the original.[66] The commercial nature of 2 Live Crew's parody was a factor to be considered, but the Court held that because 2 Live Crew's song was transformative, meaning that it effectively altered the original creation with "new expression, meaning, or message,"[67] the fair use doctrine protected 2 Live Crew. The Court recognized that the very purpose and value of parody was dependent upon its use of an original piece.[68] "[Parody] art lies in the tension between a known original and its parodic twin," the Court wrote.[69] The Court added that "[w]hen

59. *Id.*

60. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

61. *Id.* at 576.

62. C.T. Drechsler, Annotation, *Extent of Doctrine of "Fair Use" under federal Copyright Act*, 23 A.L.R.3d 139, 2 (1969).

63. 17 U.S.C. § 107.

64. *Id.*

65. *Campbell*, 510 U.S. at 571.

66.*Id.* at 583.

67. *Id.* at 579.

68. *Id.* at 588.

69. *Id.*

parody takes aim at a particular original work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable."[70] Even if a parody or other reproduction has a commercial purpose, the fair use doctrine exists to allow for artistic or scientific comment or expression using an original work in order to further benefit all of society.[71] 2 Live Crew's use of Orbison's original work to accomplish its own distinct artistic purpose in creating a parody represented a fair use of the original because it provided a social benefit distinct from that of Orbison's original production. In this way, the fair use doctrine also seems based in the public benefit rationale for copyright— copyright must leave spaces for the use and evolution of artistic or scientific thought in order to benefit society as a whole.[72]

E. Fortnite, 2 Milly, and the Milly Rock

On December 5, 2018, New York rapper 2 Milly (Terrence Ferguson) sued Epic Games, creator of the popular online video game Fortnite for copyright infringement.[73] 2 Milly alleges that Fortnite's use of his popular dance, the Milly Rock, via virtual characters in its game constitutes copyright infringement.[74]

2 Milly is best known for his 2014 hit song "Milly Rock."[75] The song and accompanying music video demonstrate a dance created by 2 Milly, also known as "the Milly Rock."[76] 2 Milly claims that he began Milly Rocking in 2011, four years prior to the release of his song, and that the dance was distinctive and recognizable with his rap persona.[77] The dance, although simple, exploded in popularity and celebrities such as Rihanna, Chris Brown, and Wiz Khalifa posted videos of themselves performing the Milly Rock on social media.[78] As of the publication of this article, the Milly Rock has 19 million views on YouTube and the song has become synonymous with 2 Milly within the hip-hop community.[79] 2 Milly has been interviewed multiple times on the origin of the dance and how to do the Milly Rock and many hip-hop artists, such as Travis Scott, have sought and been granted licenses from 2 Milly to perform the dance at

70. *Id.*

71. *See id.* at 577-78.

72. *See id.*

73. Complaint, Ferguson v. Epic Games, No. 2:18-cv-10110 (C.D. Cal. filed Dec. 5, 2018).

74. *Id.* ¶ 3.

75. *Id.* ¶ 2.

76. *Id.*; For the Milly Rock dance see Born2WinProductions, *Milly Rock x 2 Milly*, YOUTUBE (Aug. 31, 2009), https://www.youtube.com/watch?v=PMzDoFuVgRg [https://perma.cc/K8FT-VPNS].

77. Complaint, *supra* note 74, ¶ 10.

78. *Id.* ¶ 13.

79. *Id.*

concerts or other commercial venues.[80]

Fortnite has been dubbed "The Most Popular Video Game Ever."[81] Fortnite is a free-to-play online, battle-royale style video game that combines principles from building games as well as shooting games to create a unique video game experience.[82] Released in September 2017, Fortnite has had incredible commercial success, as 200 million players across platforms have generated an estimated $2 billion in revenue.[83] Fortnite is supported by in game microtransactions, meaning that while the game is free to play, players spend money to customize their in game characters by exchanging dollars for virtual currency or "V-Bucks."[84] Fortnite offers four pricing levels for purchasing V-Bucks: 1,000 V-Bucks for $9.99; 2,850 V-Bucks $24.99; 7,500 V-Bucks for $59.99; 13,500 for $99.99.[85] Using these V-Bucks players can purchase skins (avatar outfits), weapon modifications, and emotes (dances or movements).[86] Players can buy this customizable content directly on the interface or through a "Battle Pass" which allows a player to unlock content unique to that Season's Pass.[87]

The customization and emotes, in particular, are fundamental to Fortnite's success.[88] Thorough the emotes, Fortnite is able to stay current by incorporating socially relevant dance moves makes the game more fun to play.[89] Fortnite has based emotes off of popular dances, such as Psy's "Gangnam Style," (dubbed "Ride the Pony" in the game), Snoop Dogg's "Drop It Like It's Hot" (dubbed "Tidy"), Alfonso Ribeiro's "Carlton" dance from Fresh Prince of Bel-Air (dubbed "Fresh"), and Marlon Webb's "Band of the Bold," (dubbed "Best Mates").[90] On July 12, 2018, Fortnite released its Season 5 Battle Pass, which included an emote known as "Swipe It," which was identical the Milly Rock.[91] Fortnite sold the dance move as a part of its Season 5 Battle Pass, which costs users 950 V-Bucks or $9.50.[92] Players could purchase "Swipe It" separate from

80. *Id.* ¶ 14.
81. *Id.* ¶ 16.
82. *Id.* ¶¶ 17-18.
83. *Id.* ¶¶ 26-27.
84. *Id.* ¶ 20.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* ¶ 23.
89. *Id.* ¶ 24.
90. *Id.* ¶ 25.
91. *Id.* ¶¶ 29-30. For the "Swipe It" emote see Strush, *FORTNITE SEASON 5 | SWIPE IT EMOTE [MUSIC]*, YOUTUBE (Jul. 13, 2018), https://www.youtube.com/watch?v=P53ZAHEHMIo [https://perma.cc/4WP2-PLQV].
92. Complaint*, supra* note 74, ¶¶ 29-30.

the Battle Pass for 500 V-Bucks or $5.00.[93] Players worldwide immediately recognized the emote as the Milly Rock.[94] 2 Milly did not give Fortnite express or implied consent to use his likeness or the Milly Rock in the game.[95]

III. ARGUMENT

2 Milly's suit against Fortnite raises interesting questions surrounding copyright law, standing, fair use, and the appropriation of black culture in popular media. This Article will explore the merits of the suit (i.e. whether the Milly Rock represents copyrightable choreography), whether Fortnite's use constitutes copyright infringement, and whether the fair use doctrine could apply. The Article will then explain the African tradition of experiential learning and how the lack of legal protection can encourage cultural appropriation.

A. The Milly Rock Should Be Copyrightable

Copyright law has been consistently interpreted to not include social dances as copyrightable. Under the rationale of the Act, because social dances are meant to be performed by members of the public and not skilled experts, they categorically are not eligible to receive copyright protections. As discussed earlier, this idea is largely rationalized under the public benefit rationale, i.e. if the work does not benefit the public, then it is not copyrightable material. In addition, the problem of policing exists with any social dance routine. If 2 Milly were to copyright his dance move, would any teenager performing the dance at a social function be liable for damages? The well-established difficulty in performance rationale and the challenges of enforcing a copyrighted dance move necessitate the conclusion that Fortnite and Epic Games have not engaged in copyright infringement.

This is not how copyright law should function. The history of reluctance to accept choreography as a category of protectable works is well documented, and perhaps the reluctance to include social dances could be read as a natural conclusion of such reasoning. Historically, Congress has placed little social value on dance, but that tide shifted to the inclusion of the choreography category in 1976. Perhaps a shift to the inclusion of dance moves would not be too far off considering the importance of social dance in the modern culture.

Today, simple social dance routines can garner incredible notoriety

93. *Id.*
94. *Id.*
95. *Id.* ¶ 9.

through social media platforms. Twitter, Facebook, and Instagram allow an artist to share their creation and receive instant fame via shares on the platforms. In many ways, the genius and creativity of dance moves come *because of* their simplicity and repeatability not in *spite of* it. Dances like the Milly Rock gained popularity fast because they were easy for anyone to do, not because of their sophistication. In addition to the ease of performance, the incredible popularity of such dances is attributable to the joy and reactions coming from people performing the dance. If the purpose of copyright is social benefit, art that elicits the sheer amount of repetition and emotional response, like the Milly Rock, ought to be protected.

B. Can a dance performed by a digital avatar constitute copyright infringement?

Even if 2 Milly was able to convince the judge that the Milly Rock was copyrightable material, under the Act, he would have the additional hurdle of proving that Fortnite's use of the dance, by having a digital avatar perform it in the game, constituted copyright infringement. The Act has traditionally not protected choreography that was meant to be performed by non-humans, including animals, machines, or other inanimate objects. It is likely that a district court would hold that even if the Milly Rock was copyrightable material, the fact that it was meant for performance by an inanimate, non-human avatar could preclude a finding of copyright infringement.

A holding such as this, however, would seem contradictory to *Horgan,* which determined that it was not the medium of the infringing work, but instead whether the work was substantially similar to the original. There, photographs of a copyrighted choreography performance were considered infringement of the performance itself. In this case, the representation of the dance by an inanimate digital avatar is certainly substantially similar to 2 Milly's creation. The avatar moves in the exact same way as 2 Milly and because of this, it must be considered substantially similar to the original performance of the Milly Rock. In a way, a photograph of a choreographed performance is a static reproduction of the performance when compared to the avatar's emote of the Milly Rock which represents a sort of dynamic moving reproduction, but is similarly based in the original performance.

C. Fair Use Counterargument

If the Milly Rock were deemed to be a copyrightable work, Fortnite could attempt to defend their use of the dance as a fair use of the dance

under the "fair use doctrine." Fortnite would likely claim that their use of the Milly Rock was similar to a parody by citing a case similar to *Campbell v. Acuff-Rose Music, Inc.*, and that by transposing the work onto a digital avatar, Fortnite had transformed the dance to a point where the emote was distinct from the original dance. By granting 2 Milly protection in this case, Fortnite could argue that a court would be precluding the use of choreography or other art within a video game context. This result would essentially limit the production of new art in a way that could be socially undesirable. But Fortnite's use of the Milly Rock is distinguishable from 2 Live Crew's use of "Oh Pretty Woman," and other fair use cases, because Fortnite copied the dance onto another platform and does not comment on or criticize 2 Milly's original work like a parody would.

The 1976 Copyright Act calls courts to look at "the purpose and character of the use . . .; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work."[96]

Assessing Fortnite's fair use defense under these factors, the defense is likely to fail. First, Fortnite's use of the dance was to gain social legitimacy and relevance by linking their video game with a popular dance. Fortnite's repeated use of dances like Milly Rock clearly exhibit this intent and the extreme commercial success of the game is likely related to its social relevance. Second, Fortnite's reproduction of the Milly Rock encompasses the entire dance, not just a portion. Putting the legal hurdle of attempting to copyright a dance move aside, the Milly Rock is a relatively quick, simple dance move. Fortnite reuses the entirety of the Milly Rock even though the performance of the emote is not lengthy. Third, Fortnite's use of the Milly Rock has adversely affected the market for 2 Milly as many players identify the move with Fortnite and not its creator 2 Milly. Fortnite's renaming of the move to "Swipe It," and the total absence of any credit for 2 Milly creates a climate where many players believe that the dance was the original creation of Fortnite and not the repurposed work of 2 Milly. Finally, the direct monetization of the Milly Rock is unlike other potentially transformative uses. Fortnite has taken a dance move which is clearly recognizable and sold the rights to perform it in game to its users for 500 V-Bucks or $5.00. Considering the commercial nature of the reproduction and the totality of the circumstances, it is unlikely that a fair use defense would work here for Fortnite.

96. 17 U.S.C. § 107.

IV. CONCLUSION

In her master's thesis, "The Commodification and Appropriation of African-American Vernacular Dances," Danielle Jacobowitz explored the history of black dance, finding a deeply embedded culture of experiential learning, or learning by doing.[97] This sort of tradition of experiential or situational learning focuses on the environment in which a pupil learns, and that such learning is inherently tied to the pupil's community.[98]

This particular educational style has been especially apparent in the history of African-American dance culture.[99] In West Africa, children were introduced to dance early in life, repeating the dances of their family members until the moves were mastered.[100] When Europeans and Americans enslaved Africans, this dance tradition transplanted to the American south, where the same sorts of experiential learning took place on southern plantations.[101] These traditions slowly evolved into lindy hop, Mambo, and eventually hip-hop dance.[102]

Given the historical tradition of experiential learning, African-American and hip-hop dance can be described by its repeatability in contrast to the complicated ballet choreographies of Western European dance culture. These competing dance histories can help explain our copyright law tradition in which Western European choreography is protected, and African dance moves lack protection.

But what does all of this mean for copyright and dance in 2019? By categorically excluding dance moves from copyrightable material our current system of copyright law encourages the intellectual theft of Hip-Hop artists like 2 Milly. If Fortnite knows that the work of 2 Milly cannot be protected under copyright law, there is no deterrence for using his work without credit. Because of the lack of a disincentive, our current system of copyright law encourages the appropriation of hip-hop dance. Our legal tradition must begin to recognize the imbalance of protection and take steps to ensure that all artists can receive the proper protections of copyright. The best place to start would be allowing dance moves to be copyrightable material.

The categorical exclusion of dance moves as copyrightable content leaves 2 Milly with little likelihood for obtaining legal relief. The history

97. Danielle Jacobowitz, Dissertation, The Commodification and Appropriation of African-American Vernacular Dances (2016) (unpublished master's thesis, University of Washington), https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/36569/Jacobowitz_washington_0250O_15807.pdf?sequence=1.

98. *See id.* at 5.

99. *See id.* at 7.

100. *See id.*

101. *Id.* at 7-8.

102. *Id.* at 13, 19, 30.

of reluctance to recognize choreography as its own category of copyrightable material may suggest the possibility of expanding the law to include dance moves like the Milly Rock. But without copyright protection, the work of artists, and in particular, African-American artists, is subject to appropriation. Companies like Epic Games face no deterrent for their use of the work of hip-hop artists. For this reason, the law should expand and recognize the social benefit of dance moves.